

***United States Court of Appeals
for the Second Circuit***



APPENDIX

75-7437

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
DOCKET NO. 75-7437

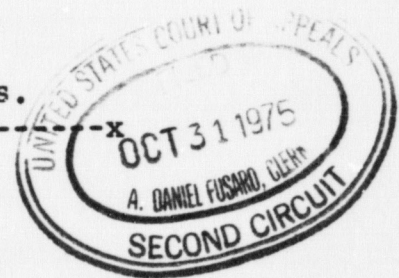
-----x
SHIRLEY HERRIOTT BROOKS, GLORIA JONES,
individually and on behalf of all others
similarly situated,

Plaintiffs-Appellants,

-against-

FLAGG BROTHERS, INC., individually and as
representatives of a class of all others
similarly situated, HENRY FLAGG, individually
and as President of Flagg Brothers, Inc., THE
AMERICAN WAREHOUSEMEN'S ASSOCIATION OF
REFRIGERATED WAREHOUSES, INC., WAREHOUSEMEN'S
ASSOCIATION OF NEW YORK AND NEW JERSEY, INC.,
THE COLD STORAGE WAREHOUSEMEN'S ASSOCIATION OF
THE PORT OF NEW YORK, and LOUIS J. LEFKOWITZ,
as Attorney General of the State of New York,

Defendants-Appellees.



APPENDIX

THE LEGAL AID SOCIETY OF WESTCHESTER
COUNTY

BY: Martin A. Schwartz, Of Counsel
Lawrence S. Kahn, Of Counsel
Evelyn Isaac, Of Counsel

Attorneys for Plaintiffs-Appellants
Office & P.O. Address
56 Grand Street
White Plains, New York 10601
Tel. No. (914) 761-9200

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PAGINATION AS IN ORIGINAL COPY

UNITED STATES COURT OF APPEALS OF THE
SECOND CIRCUIT
DOCKET NO. 75-7437

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SHIRLEY HERRIOTT BROOKS, GLORIA JONES,
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AMERICAN WAREHOUSEMEN'S ASSOCIATION OF
REFRIGERATED WAREHOUSES, INC., WAREHOUSEMEN'S
ASSOCIATION OF NEW YORK AND NEW JERSEY, INC.,
THE COLD STORAGE WAREHOUSEMEN'S ASSOCIATION OF
THE PORT OF NEW YORK, and LOUIS J. LEFKOWITZ,
as Attorney General of the State of New York,

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-----X

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CHRONOLOGICAL LIST OF DOCKET ENTRIES

COURT

Jury demand, date

JUDGE WERKER

TITLE OF CASE

SIMILEY HERRIOT BROOKS, individually and on behalf of all others similarly situated;

Plaintiffs,

and

GLORIA JONES,

Plaintiff-Intervenor,

-against-

FLAGG BROTHERS, INC. individually and as representative of a class of all others similarly situated, HENRY FLAGG, individually and as President of FLAGG BROTHERS, INC.,

Defendants,

and

THE ATTORNEY GENERAL OF THE STATE OF NEW YORK, THE AMERICAN WAREHOUSEMEN'S ASSOCIATION: THE INTERNATIONAL ASSOCIATION OF REFRIGERATED WAREHOUSES, INC.; THE WAREHOUSEMEN'S ASSOCIATION OF THE PORT OF NEW YORK; and THE COLD STORAGE WAREHOUSEMEN'S ASSOCIATION OF THE PORT OF NEW YORK,

Defendants-Intervenors

For plaintiff:

The Legal Aid Society of Westchester County, 56 Grand St., White Plains, NY 10601 914-761-9200

For defendant:

Brodsky, Linett Altman-1776 Bway, NYC 10019 CI 5-6630 (Flagg Defts)

Arthur H. Ellis (for J.A. Levister)

City Hall, Mt. Vernon, NY 10550 (212-668-

Werner & Weiss (Intervenors Am. Warehousemen, et. al.) 2 W. 45th St., NYC. 10036 -- 697-6969

Louis J. Lefkowitz, Atty. Gen'l (pro-se) 2 World Trade Center, NYC 10047

Jaffe, Shaw & Rosenberg (Warehouse A. 51 Mad. Ave., NYC 10010 (& Cold Storage 683-0275

STATISTICAL RECORD	COSTS	DATE	NAME OR RECEIPT NO.	RFC.	DISP.
\$ 5 mailed x	Clerk	SEP 2 1 197	1-137	15	
\$ 6 mailed ✓	Marshal	9/2/73	1-137	5	5
sis of Action: Violation of Civil Rights 42 USC 983 & 1985. \$25,000.	Docket fee	7/24/73	1-137	5	5
	Witness fees	3/29/73	1-137		
tion arose at:	Depositions				

PROCEEDINGS

Date Order
Judgment Made

- Filed complaint and issued summons.
- Filed Affidavit & order of service of an Individual.
- Filed summons - copy received by James A. Heuisti, on 9-24-73.
- 2-73 Filed Stip & Order extending time for debts to answer or make any motion with regard to S&C to 11/5/73. TENNEY, J.
- 2-73 Filed Stip & Order extending time for debts to answer, amend or make any motion to 1/5/74 no storage charges shall accrue or be imposed upon plaintiff by debts Flagg and Flagg Brothers Inc to 1/5/74 Tenney, J.
- 2-14-73 Filed Plaintiff's Interrogatories.
- 2-26-73 Filed debt's Flagg affidavit & notice of motion to dismiss action, as a class action ret. 1-9-74.
- 2-26-73 Filed debt's Flagg Brothers memorandum in support of motion to dismiss.
- 2-14-74 Filed Stip & Order extending time for J.A. Levister to answer to 1/25/74. TENNEY, J.
- 2-14-74 Filed Stip of Substitution for Defts. Flagg Bros. Inc. & Henry Flagg, TENNEY.
- 2-15-74 Filed Stipulation & Order that a Motion made by said debts to dismiss action as class action returnable 1/9/74 be withdrawn upon condition that said withdrawal shall not be prejudicial to the right of the debts to a Court determination subsequent to discovery by Plaintiff as to whether a class action properly lies herein and to move under Rule 11A of Civil Rules of the Court. TENNEY, J.
- 2-15-74 Filed Memo End on Notice of Motion dismissing instant action as class action, etc. as indicated, dtd. 12/26/73. Motion withdrawn. So Ordered. TENNEY, J. (mn)
- 2-25-74 Filed Debt Henry Flagg's Answer to Plaintiff's interrogatories.
- 2-28-74 Filed ANSWER of defendant James A. Levister
- 2-31-74 Filed stipulation and order of discontinuance as to defendant JAMES A. LEVISTEP only with prejudice and without costs. -- Tenney, J.
- 2-8-74 Filed affdvt. and notice of motion (by proposed intervenor Louis J. Lefkowitz) to intervene - ret. 2-22-74
- 2-29-74 Filed stip. and order ext. time for N.Y. State Movers & Warehousemen's Association, Inc. the defendants and intervening defendant to answer to 4-10-74 -- Gurfein, J.
- 2-29-74 Hearing on motion for consolidation and class action begun and concluded. Motion for consolidation moot - Motion for class action - Decision reserved. To be submitted: Discontinuance in 73-4736, 73-4050 summary judgment or stipulation of facts. -- Gurfein, J.
- 2-10-74 Filed ANSWER of defendants Flagg Brothers Inc. and Henry Flagg.
- 2-19-74 Filed affdvt. and notice of motion for intervention by proposed intervenors - ret. 5-1-74
- 2-19-74 Filed statement of points of law and authorities in support of motion to intervene by proposed intervenors.
- 2-19-74 Filed ANSWER by American Warehousemen's and International Association of Refrigerated Warehouses, Inc., proposed intervenor defendants
- 2-26-74 Filed debt's affdvt. of Alvin Altman in opposition to motion to intervene.
- 2-26-74 Filed debts answering memorandum of points and authorities in opposition to motion to intervene.
- 2-26-74 Filed plaintiff's affdvt. of Gene F. Reisman in opposition to motions to intervene

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BLEA

W&A

-- cont'd page 3 --

CHRONOLOGICAL LIST OF DOCKET ENTRIES

PROCEEDINGS

Date of
Judgment

- Filed Intervenor Gloria Jones reply affdvt. of Laurence S. Katz.
- Filed reply memorandum of American Warehousemen's Association and International Association of Refrigerated Warehouses, Inc. to pltf's memorandum of points and authority in opposition to motions to intervene
- un-26-74 Filed plaintiffs' memorandum of points and authorities in opposition to motions to intervene
- un-26-74 Filed proposed Intervenor Jones reply memorandum in support of motion to intervene.
- un-26-74 Filed affdvt. and notice of motion for an order permitting Gloria Jones to intervene - ret. 4-29-74
- 6-26-74 Filed proposed intervenor's (Gloria Jones) memorandum of points and authorities in support of motion to intervene.
- un-26-74 Filed affdvt. and notice of motion permitting Warehousemen's Association of the Port of New York, Inc. and the Cold Storage Warehousemen's Association of the Port of N.Y. to intervene - ret. 4-24-74
- un-26-74 Filed OPINION #40873...The four motions to interve as party defendants are granted; The State Attorney General of the State of New York is permitted to intervene on consent. Further caption in the action shall include the names of the intervening parties. It is so ordered. --
- Pltf. Brooks has no claim for injunctive relief but only a claim for damages and declaratory relief. -- Gurfein, J.
- un-20-74 Filed stip. and order that the proposed intervenor's complaint of Gloria Jones, as annexed to her motion to intervene in this action, is hereby deemed to be her actual complaint. Further stipulated that service of the complaint and issuance and service of summons is hereby waived; defendants time to answer shall be ext. 20 days subsequent to date of Court's approval hereof. So ordered - Gurfein, J.
- Dep.12-74 Filed Stipulation that pltf's motion of a class action and for summary judgment be adjourned until 10/16/74 to be served personally - So ordered Gurfein, J.
- Oct- 7-74 Filed deft. Flagg Brothers affdvt. and notice of motion (CROSS MOTION) to dismiss complaint. - ret. 10-16-74
- Oct- 7-74 Filed memorandum of deft. Flagg Brothers and Henry Flagg in support of cross motion to dismiss.
- Oct- 9-74 Filed memorandum of law of Henry Flagg in support of cross motion to dismiss.
- Oct-13-74 Filed stip. and order that pltf's motion for class action be adj. to 10-16-74 and deft's cross-motion be adj. to 10-21-74, reasoning memoranda to be served by 10-17-74 and all replies to be served by 10-21-74. -- Hockett, J. (H.H.)
- Nov- 6-74 Filed defendants' reply memorandum of points and authorities in support of cross-motion to dismiss

over

PROCEEDINGS

Date Of Judgment

(201)

Filed Order designating Judges Paul R. Hays, C.J. and Charles E. Stewart, D.J. in addition to Judge Werker to hear and determine this cause. -- Kaufman, Ch.J. - USCA m/n

21-75 Filed 2nd copy of above order.

26-75 Filed stip. and order amending caption of action as indicated. (see front of docket.) -- Werker, J.

17-75 Filed deft.(pro-se) intervenor supplemental memorandum of law of attorney general, (deft. intervenor).

18-75 Hearing begun & concluded - motion to dissolve 3 Judge Court by plff. - granted.

26-75 Filed plff's notice of motion to dissolve Three-Judge-Court - ret. 5-5-75: (memorandum of law attached to above)

26-75 Filed memo endorsed on above motion: Motion granted in open Court. -- Werker, J.

7-75 Filed deft.-intervenors The Am. Warehousemen's Assoc. and the Internat'l Assoc. of Refrigerated Warehouses, Inc., memorandum of points and authorities in opposition to plff's motions for class action determination and summary judgment.

7-75 Filed deft.-intervenors AWA and IARW's affidavits in opposition to plaintiffs motions

7-75 Filed affdvt. of Arnold H. Shaw on behalf of deft.-intervenors The Warehousemen's Assoc. of the Port of NY, Inc. and Cold Storage Warehousemen's Assoc. of the Port of N.Y.

7-75 Filed plaintiffs' memorandum of points and authorities in opposition to motion to dismiss complaint.

7-75 Filed plaintiffs' memorandum of points and authorities in support of motion to dissolve 3-Judge Court.

7-75 Filed plaintiffs' memorandum of points and authorities in support of motions for class action determination and summary judgment.

7-75 Filed plaintiffs' memorandum of points and authorities in support of plaintiff and defendant class action stipulations.

7-75 Filed plaintiffs affdvt. and notice of motion for class action determination and summary judgment. - ret. 9-9-74

7-75 Filed memo endorsed on above motion: Motion denied. Complaint dismissed. See opinion #42742. So ordered. -- Werker, J. m/n

7-75 Filed memo endorsed on deft. Flagg's motion filed 10-6-74 (to dismiss): Motion granted. See opinion #42742. So ordered. -- Werker, J. m/n

7-75 Filed OPINION #42742...Plaintiffs motion for class action determination and for summary judgment is denied. Defendants motion to dismiss for lack of jurisdiction is granted. Plaintiffs' action is dismissed for lack of jurisdiction. Plaintiffs have failed to show sufficient state involvement in the enforcement of warehousemen's liens to confer jurisdiction upon a federal district court under 28:1333, or to state a claim under 42:1963. The action is therefore dismissed. So ordered. -- Werker, J. m/n

24-75 Filed plaintiff's notice of appeal to the USCA for the 2nd Circuit from order denying plaintiffs motion for class action and summary judgment and granting defendants motion to dismiss for lack of jurisdiction. -- copies mailed to: A. Seth Greenwald, Esq., Alvin Altman, Esq; Norman Weiss, Esq. and Arnold Shaw, Esq.

VERIFIED COMPLAINT - CLASS ACTION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SHIRLEY HERRIOTT BROOKS, individually
and on behalf of all others similarly
situated,

Plaintiffs,

-against-

FLAGG BROTHERS, INC., individually and
as representative of a class of all
others similarly situated, HENRY FLAGG,
individually and as President of Flagg
Brothers, Inc., and JAMES A. LEVISTER,
individually and as City Marshall of
the City of Mount Vernon, New York,

Defendants.

VERIFIED COMPLAINT
CLASS ACTION

13 Civ. 9050

I.

PRELIMINARY STATEMENT

1. This is a class action for injunctive and declaratory relief and damages brought pursuant to 42 U.S.C. §§1983 and 1985. Plaintiffs challenge the constitutionality of New York Uniform Commercial Code, §§7-209 and 7-210 on the grounds that these statutes violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution in that they grant a warehouseman a lien and the right to sell stored goods for warehouseman's fees allegedly due without granting the owner of the stored goods an opportunity for a hearing prior to the imposition of the lien and sale.

II.

JURISDICTION

2. Jurisdiction is conferred on this Court by 28 U.S.C. §1343(3) which provides for the original jurisdiction of this Court in suits brought under color of any State statute, ordinance, regulation, custom or usage to redress rights, privileges and immunities secured by the United States Constitution without regard to the amount in controversy.

VERIFIED COMPLAINT - CLASS ACTION

3. Jurisdiction is also conferred on this Court by 28 U.S.C. §1343 1(1), (3) and (4) which grants this Court jurisdiction over claims authorized by 42 U.S.C. §1985.

4. Plaintiffs' request for injunctive relief and damages is authorized by 42 U.S.C. §§1983 and 1985. Plaintiffs' request for a declaratory judgment is authorized by 28 U.S.C. §§2201 and 2202.

III.

CLASS ACTION ALLEGATIONS

A. Plaintiff Class

5. Plaintiffs are members of a class of persons whose property is stored in a warehouse located in the State of New York and whose property has been encumbered by a lien pursuant to New York Uniform Commercial Code §7-209 and subject to sale pursuant to New York Uniform Commercial Code §7-210 because of warehouse fees allegedly due, without opportunity for a prior hearing.

6. This class action is properly brought pursuant to Rule 23 of the Federal Rules of Civil Procedure because: (a) the class is so numerous that joinder of all members is impracticable. There are numerous persons whose property is stored in a warehouse in the State of New York whose property has been encumbered by a lien and subject to sale without a prior opportunity to be heard; (b) there are questions of law and fact common to the class, namely, the constitutional validity of New York Uniform Commercial Code, §§7-209 and 7-210; (c) the claims of the representative plaintiffs are typical of the claims of the members of the class and it can reasonably be expected that defendants will interpose identical defenses to such claims; (d) the Legal Aid Society of Westchester County, attorney for plaintiffs, will fairly and adequately protect the interests of the class; and (e) defendants, in failing to provide plaintiffs without an opportunity to be heard, have acted and refused to

act on grounds generally applicable to the class.

B. Defendant Class

7. Defendant Flagg Brothers is a representative of a class of defendants, all of whom are warehousemen doing business in the State of New York and who impose liens and subject goods to sale pursuant to New York Uniform Commercial Code §§209-210 without affording the owner of the goods a prior opportunity to be heard.

8. This class is so numerous that joinder of all members is impracticable. The issue of law presented by this action is common to all members of the defendant class and the defendant has acted and refused to act on grounds generally applicable to the class. In addition, the prosecution of separate actions against individual members of the defendant class could create a risk of inconsistent adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the members of the defendant class; adjudications with respect to the individual members of the defendant class as a practical matter would be dispositive of the interests of the other members of the defendant class; the questions of law and fact common to the members of the class predominate over any questions affecting individual members, and a class action is superior to other available methods for the fair and different adjudication of the controversy.

IV.

THE PARTIES

9. Plaintiff Shirley Herriott Brooks is a citizen of the United States and of the State of New York. Plaintiff resides at 188 North Kensico Avenue, White Plains, New York with her three children, George, Jr., age 12, Tonya, age 11 and Michael, age 10. Plaintiff's husband died in an automobile accident approximately one year ago. Plaintiff is employed as a nurse's aid by the Brooke Rehabilitation Center, White Plains, New York,

VERIFIED COMPLAINT - CLASS ACTION

for which her take home pay is approximately \$100 per week. This is the sole source of income for plaintiff and her family.

10. Defendant Flagg Brothers, Inc. is a corporation organized under the laws of the State of New York and is engaged in the business of moving and storage in the State of New York. Defendant maintains an office and is engaged in business at 247 South Fifth Avenue, Mount Vernon, New York.

11. Defendant Herry Flagg is President of defendant Flagg Brothers, Inc. He is being sued individually and in his official capacity.

12. Defendant James A. Levister is the City Marshall of the City of Mount Vernon, New York. He is being sued individually and in his official capacity.

V.

FACTUAL ALLEGATIONS

13. In the spring of 1973, plaintiff and her family were residing at 33 North 3rd Avenue, Mount Vernon, New York. Pursuant to an order of eviction that had been entered against plaintiff by the City Court of Mount Vernon, defendant Levister, City Marshall of the City of Mount Vernon, appeared on June 13, 1973 to remove plaintiff and her possessions from her apartment.

14. When defendant Levister appeared to remove plaintiff and her possessions from her apartment on June 13, 1973, plaintiff informed defendant Levister that she wanted to call someone to store her furniture and other household possessions. Defendant Levister informed plaintiff that she couldn't get anyone to store her furniture and that the man with him, defendant Flagg, was the man who would store her furniture. Plaintiff was led to believe by defendant Levister's comments that she had no choice but to let defendant Flagg store her goods.

VERIFIED COMPLAINT - CLASS ACTION

15. Defendant Flagg informed plaintiff that plaintiff would have to pay \$65 per month for the moving and storage of the furniture. Plaintiff informed defendant Flagg that this sounded like a high price, but believing that she had no choice in the matter, told defendant Flagg to proceed with the moving and storage of her furniture and household possessions.

16. After plaintiff's goods were loaded on one of the defendant Flagg Brothers' trucks, one of Flagg Brothers' moving men told plaintiff that she would have to pay \$178. Plaintiff protested, since she had been led to believe that \$65 was the entire cost. The moving man explained that she would have to pay \$75 per month for storage, \$75 for barrelling and platforming and \$28 for fumigating, for a total of \$178. Plaintiff inquired whether she had to have fumigating and the moving man responded that fumigating was required. After first insisting on payment in cash, defendant Flagg agreed to accept plaintiff's check for \$178.

17. After plaintiff was evicted, she and her children moved into her cousin's apartment at 120 North Kensico Avenue, White Plains, New York.

18. On or about June 15, 1973, plaintiff called defendant Flagg Brothers in order to find out how long defendant Flagg Brothers would store plaintiff's goods for her \$178 payment. An employee of defendant Flagg Brothers informed plaintiff that she owed defendant Flagg Brothers an additional \$156.

19. On or about June 19, 1973, plaintiff went to the office of defendant Flagg Brothers. Plaintiff was given a "Combined Uniform Household Goods Bill of Lading and Freight Bill" indicating that defendant Flagg Brothers regarded the \$178 payment as a "deposit" and that there was a "balance due" of \$156. A copy of this Bill of Lading and Freight Bill is annexed hereto as Exhibit "A". Plaintiff informed defendant Henry Flagg that the prices were unreasonable and that plaintiff couldn't pay

VERIFIED COMPLAINT - CLASS ACTION

them. Defendant Henry Flagg informed plaintiff that on the first of July, 1973, plaintiff would owe an additional \$15 for storage for the month of July. Plaintiff told defendant Henry Flagg that her storage on June 13, 1973 should run to July 13, 1973. Defendant Henry Flagg informed plaintiff that even if her goods had been stored on June 29, 1973, the storage charges are on a "per month" basis and that an additional \$75 would be due by July 1, 1973.

20. On or about June 29, 1973, plaintiff made a telephone call to defendant Henry Flagg. Defendant Flagg offered to let plaintiff remove her goods by July 13, 1973 if plaintiff would pay the balance of the original bill allegedly due (\$156) plus \$45. Plaintiff informed Mr. Flagg that her original payment should cover the storage of the goods from June 13, 1973 to July 13, 1973. Plaintiff was unable to remove her goods by July 13, 1973 because she was sharing an apartment with her cousin and there was, at this time, insufficient space in the apartment for her goods.

21. Approximately one week later, in early July, 1973, plaintiff called defendant Henry Flagg for a delivery date for her goods. Mr. Flagg's secretary gave plaintiff a date of August 14, 1973. Defendant Flagg Brothers' secretary told plaintiff that plaintiff could only obtain her possessions if she paid \$484 in cash, which amount included the past balance allegedly due. Defendant Henry Flagg told plaintiff that payment had to be in cash and that Flagg Brothers does not accept checks or money orders.

22. On or about August 25, 1973, plaintiff received a letter dated August 22, 1973 from defendant Flagg Brothers stating:

"Your account has to be brought up to date within 10 days of the date of this letter (Sept. 1, 1973) or your furn. will go up for sale. It, has [sic] (your storage payments) have to be paid each month on the 1st and has to be kept up or your furniture will

VERIFIED COMPLAINT - CLASS ACTION

will be sold. Your previous bal. from
Moving due \$156.00
Storage for 7/73 & 8/73 150.00 at \$75.00 a month
Total Bal. \$306.00"

A copy of this letter is annexed hereto as Exhibit "B".
Accompanying this letter from defendant Flagg Brothers was a
"Final Notice" noted August 22, 1973 informing plaintiff that
unless payment on her storage account was made, defendant
Flagg Brothers would advertise her goods for public auction.
A copy of this Notice is annexed hereto as Exhibit "C".

23. On August 24, 1973, plaintiff wrote to defendant
Flagg Brothers detailing her position and claims regarding
defendant Flagg's billing computations and methods. A copy of
this letter is annexed hereto as Exhibit "D".

24. On August 23, 1973, plaintiff's attorney wrote to
defendant Flagg Brothers contesting defendant Flagg Brothers'
constant change in warehouse fees allegedly due. A copy of
this letter is annexed hereto as Exhibit "E". A copy of
defendant's response to this letter is annexed hereto as
Exhibit "F".

25. All of plaintiff's furniture and household goods are
presently in defendant Flagg Brothers warehouse. Defendants
continued detention of plaintiff's goods, all of which are
essential items of household furniture, and the imposition of
the statutory lien pursuant to New York Uniform Commercial Code
§7-209 have resulted in plaintiff and her family having to
reside without these items, thereby causing plaintiff and her
family grave and irreparable harm. A list of these goods are
annexed hereto as Exhibit "G". Defendants have threatened to
sell these goods pursuant to New York Uniform Commercial Code
§7-210 without affording plaintiff an opportunity to be heard.
The sale of these goods without a prior hearing will cause
plaintiff and her family further grave and irreparable injury
in that the goods being held by defendant Flagg Brothers
constitute essential items of household furniture which

VERIFIED COMPLAINT - CLASS ACTION

plaintiff, because of her limited income of approximately \$100 per week, cannot afford to replace.

26. On information and belief, a conspiracy agreement, or understanding exists between defendants Levister, Henry Flagg and Flagg Brothers pursuant to which defendant Levister notifies defendant Henry Flagg or other officer or employee of Flagg Brothers, Inc. that an eviction is to take place to enable defendant Flagg Brothers to obtain the contract for the moving and storage of the evicted tenant's goods. The source of this allegation are the facts alleged in paragraphs 14 and 15, supra.

27. The imposition of a warehouseman's lien pursuant to New York Uniform Commercial Code §7-209 and the threatened sale of the goods pursuant to New York Uniform Commercial Code §7-210 are actions under color of state law in that they are actions fostered and authorized by New York State statutes and are activities traditionally carried out by public officials and thus constitute public functions.

VI.

LEGAL CLAIMS

28. Defendants imposition of a lien on plaintiffs' goods pursuant to New York Uniform Commercial Code §7-209 and threatened sale of plaintiff's goods pursuant to New York Uniform Commercial Code §7-210 without affording plaintiff an opportunity for a prior hearing violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

29. New York Uniform Commercial Code §§209 and 210 violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution in that they authorize the encumbrance of a lien and the sale of goods stored in a warehouse for warehouse charges allegedly due without affording the owner of the goods an opportunity to be heard.

30. New York Uniform Commercial Code §§209 and 210 violate the Equal Protection Clause of the Fourteenth Amendment to the

VERIFIED COMPLAINT - CLASS ACTION

United States Constitution in that these statutes have the effect of irrationally and arbitrarily discriminating against persons of low income. Persons with means can pay the amount of alleged debts for warehouse moving and storage and contest the legality of the debt in a subsequent legal proceeding, thereby obtaining their goods. Low income persons such as plaintiff do not have this option and cannot prevent the imposition of the statutory lien and sale without an opportunity to be heard.

31. The conspiracy, agreement or understanding set forth in paragraphs 25, supra violates 42 U.S.C. §§1983 and 1985 and the Due Process Clauses of the Fourteenth Amendment to the United States Constitution in that it denied and continues to deny plaintiff and all others similarly situated of their property without due process of law.

WHEREFORE, plaintiffs respectfully pray on behalf of herself and all others similarly situated that this Court:

1. Assume jurisdiction of this action and issue a preliminary and permanent injunction:

(a) Enjoining defendants, their officers, employees, agents and successors from encumbering plaintiffs' goods and selling these goods without affording plaintiff an opportunity to be heard.

(b) Enjoining defendants, their officers, employees, agents and successors from enforcing New York Commercial Code §§7-209 and 210 without affording plaintiff an opportunity for a hearing prior to the imposition of a lien or the sale of goods placed by an owner in a warehouse.

(c) Mandate defendants, their officers, employees, agents and successors to provide plaintiffs with an opportunity for a hearing prior to the imposition of a lien and sale of goods placed by an owner in a warehouse.

(d) Enjoining defendants, their officers, employees,

VERIFIED COMPLAINT - CLASS ACTION

agents and successors from conspiring, agreeing or otherwise acting jointly and in concert as described in paragraph 26 herein.

2. Enter a final judgment declaring defendants' imposition of a lien and threatened sale of plaintiffs' goods and New York Uniform Commercial Code §§7-209 unconstitutional in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution.

3. Enter a final judgment declaring the conspiracy, agreement or understanding set forth in paragraph 26 herein in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. §§1983 and 1985.

4. Enter a final judgment awarding plaintiff \$5,000 actual and nominal damages against the defendants jointly and severally.

5. Enter a final judgment awarding plaintiffs \$20,000 punitive damages against defendants, jointly and severally.

6. Determine this to be a valid class action pursuant to Rule 23 of the Federal Rules of Civil Procedure.

7. Award plaintiffs their costs, disbursements and attorneys' fees.

8. Award plaintiffs such other, further and alternative relief as to this Court may be just and proper.

Dated: September 21, 1973
White Plains, New York

Respectfully submitted,

Martin A. Schwartz

THE LEGAL AID SOCIETY OF WESTCHESTER
COUNTY

by: Gene F. Reibman, of Counsel
Martin A. Schwartz, of Counsel
Attorneys for Plaintiffs
56 Grand Street
White Plains, New York 10601
Tel. No. (914) 761-9200

VERIFICATION

STATE OF NEW YORK)
) SS.:
COUNTY OF WESTCHESTER)

SHIRLEY HERRIOTT BROOKS, being duly sworn, deposes and says that she is the plaintiff in the within action, that she has read paragraphs 13 to 27 of the within action and knows the contents thereof and that the same is true to her own knowledge, except as to those matters stated therein to be on information and belief, and as to those matters she believes them to be true.

Shirley Herriott Brooks
Shirley Herriott Brooks

Sworn to before me this
20th day of September, 1973

John T. Hand

— JOHN T. HAND
Notary Public, State of New York
No. 60-6754030
Qualified in Westchester County
Term Expires March 30, 1974

CONTRACT TERMS AND CONDITIONS

(b) No carrier or party in possession of all or any of the property herein described shall be liable for any loss thereof or damage thereto, or delay caused by the acts of God, the public enemy, the acts of public authority, quarantine, riots, strikes, perils of navigation, or the act or default of the shipper or owner, the nature of the goods or the inherent vice therein. Except in case of negligence of the carrier or party in possession, no carrier or party in possession of all or any of the property herein described shall be liable for the loss or damage to or destruction of the property herein described while in its possession, operation or functioning, whether or not such property or any part of it is sealed, packed, or unpacked, or packed and unpacked by the shipper or its agent or the carrier or its agent. Except in cases of negligence of the carrier or party in possession, no carrier or party in possession of all or any of the property herein described shall be liable for damage to or loss of contents of pieces of furniture, crates, bundles, cartons, boxes, barrels or other containers unless such contents are open for the carrier's inspection and then only for such articles as are specifically listed by the shipper as contents of such containers or the carrier or its agent.

[illegible][illegible]

CLAIMS PROCEDURE AND LIMITATIONS

In all cases not prohibited by law, the carrier shall be liable for the full value of the property as determined by the classification or tariffs upon which the rate is based, such lower value shall be the maximum amount to be recovered, whether or not such loss or damage occurs from negligence.

(b) As a condition precedent to recovery, claims must be filed in writing with the receiving or delivering carrier, or carrier's insurer, within nine months after delivery of the property (or, in case of export traffic, within nine months after delivery at port of export) or, in case of failure to make delivery, then within nine months after a reasonable time, for notice of loss has elapsed; and suits shall be instituted against any carrier on or within two years and one day from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or that the claim is being contested. Where claims are not filed or suits are not instituted thereon in accordance with the foregoing provisions, the full benefit of any insurance that may have been effected upon the property shall be deemed to have been received by the claimant.

(c) Any carrier or party liable on account of loss or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or for said property, and shall be reimbursed by the carrier or party liable for the premium paid thereon. The carrier or party liable shall not be bound to effect insurance on said property, and no carrier or party liable shall be liable and such claims will not be paid.

(d) Any claim for loss, damage or overcharge whether made by the consignee, consignor or a third party beneficiary, shall be in writing and shall be accompanied by original paid Bill for transportation and original Bill of Lading, if not previously surrendered to carrier. Carrier may require certified or sworn statement of claim.

Sec. 3. Except where such service is required as the result of carrier's negligence, all property shall be subject to necessary cooerage, packing and repacking at owner's cost.

[illegible]

after placement of the property for delivery at destination, at the time tender of delivery of the property to the party entitled to receive it or at the address given for delivery has been made, may be kept in vehicle, warehouse or place of business of the carrier, subject to the tariff charge for storage and carrier's responsibility as warehouseman, only, or at the option of the carrier, may be removed to and stored in a warehouse at the point of delivery or at other available points, at the cost of the owner, and there held without liability on the part of the carrier, and subject to a lien for all transportation and other lawful charges, including a reasonable charge for storage. In the event the consignee can not be found at the address given for delivery, then in that event, notice of the placing of such goods in warehouse shall be left at the address given for delivery and mailed to any other address given on the bill of lading for notification, showing the warehouse in which such property shall be left at the expense of the owner.

[illegible]

(e) Where perishable property which has been transported to destination is refused by consignee or party entitled to receive it, or consignee or party entitled to sell the same to the best advantage at private sale, the carrier or owner of the property shall be liable to receive it, or consignee or party entitled to sell the same to the best advantage at private sale, or the failure to receive it and request public sale; provided, that, if there be time for service of notification to the consignee or owner of the refusal of the property or the failure to receive it and request public sale, such manner as the exercise of the diligence requires, before the property is sold.

(d) Where the procedure provided for in the two paragraphs last preceding is not possible, it is agreed that nothing contained in said paragraphs shall be construed to prevent the owner from disposing of the property in such manner as may be authorized by law.

(d) Where the procedure provided for in the two preceding sections is applied, the carrier shall be authorized by law to abridge the right of the carrier at its option to sell the property under such circumstances and in such manner as may be authorized by law.

(e) The proceeds of any sale made under this section shall be applied by the carrier to the payment of advances, tariff charges, packing, storage, and any other charges and the expense of notice, advertisement, sale, and other necessary expense and of caring for and maintaining the property, if proper care of the same has been neglected by the owner or his agent, and the balance, if any, shall be paid to the owner of the property sold hereunder.

(1) Where the carrier is directed to load property from (or render any services at) a place or places at which the consignor or his agent is not present, the prop-

Where the carrier is directed to load property from (or render any services) at the place or places at which the consignor or its agent is not present, the risk shall be at the risk of the owner before loading.

ARTICLES OF EXTRAORDINARY VALUE, DOCUMENTS, SPECIE

Sec. 5. No Carrier hereunder will carry or be liable in any way for any documents, specie, or for any articles of extraordinary value not specifically rated in the published classifications or tariffs unless a special agreement to do so and a stipulated value of the articles are endorsed hereon.

Sec. 6. Explosives or dangerous goods will not be accepted for shipment. Every party whether principal or agent shipping such goods shall be liable for an

Sec. 6. Explosives or dangerous goods will not be accepted for shipment. Every party interested in the shipment shall indemnify the carrier against all loss or damage caused by such goods and carrier will not be liable for sale delivery of the shipment.

Sec. 7. The owner or consignee shall pay the advances, tariff charges, packing and storage, if any, and all other lawful charges on said property; but, except in those instances where it may lawfully be authorized to do so, no carrier shall deliver or relinquish possession at destination of the property covered by this bill of lading until the owner or consignee has paid to the carrier the advances, tariff charges, packing charges, storage and all other lawful charges.

[illegible]

mafter provided) shall not be liable for transportation charges. Provided, that, where the carrier has been instructed by the shipper or consignor to deliver said property to a consignee other than the shipper or consignor, such consignee shall not be legally liable for transportation charges in respect of the transportation of said property (beyond the point at which the property has been delivered to him, if he is otherwise liable) which may be found to be due after the property has been delivered to him, if he is otherwise liable. (b) prior to delivery of said property has notified the delivering carrier in writing of the intended destination of said property, and the carrier has agreed to deliver said property to such destination, the carrier shall not be liable for transportation charges in respect of the transportation of said property (beyond the point at which the property has been delivered to him, if he is otherwise liable) which may be found to be due after the property has been delivered to him, if he is otherwise liable.

consignee (a) is an agent only and has not beneficial title in said property, and (b) prior to delivery of said property has notified the carrier in writing of the fact of such agency and absence of beneficial title, in the case of a shipment recognized or diverted to a point other than that specified in the original bill of lading, and (c) in the case of a shipment recognized or diverted to a point other than that specified in the original bill of lading, the carrier has also notified the delivering carrier in writing of the name and address of the beneficial owner of said property, and in such cases the carrier erodes no liability for the loss of or damage to the property, and the carrier shall be liable for the loss of or damage to the property in the case of a shipment so recognized or diverted, the beneficial owner, shall be liable for such additional charges. If the consignee is not the beneficial owner, the carrier to request the consignee to notify the carrier in writing of the name and address of the beneficial owner of said property, and in such cases the carrier erodes no liability for the loss of or damage to the property, and the carrier shall be liable for the loss of or damage to the property in the case of a shipment so recognized or diverted, the beneficial owner, shall be liable for such additional charges. If the consignee is not the beneficial owner, the carrier to request the consignee to notify the carrier in writing of the name and address of the beneficial owner of said property, and in such cases the carrier erodes no liability for the loss of or damage to the property, and the carrier shall be liable for the loss of or damage to the property in the case of a shipment so recognized or diverted, the beneficial owner, shall be liable for such additional charges.

of a shipment to be recognized or diverted, the beneficial owner, shall be liable for such additional charges. Nothing herein shall limit the right of the carrier to require payment as to who the beneficial owner is, such consignor shall himself be liable for such additional charges. Nothing herein shall limit the right of the carrier to require payment of the time of shipment, the preparation of the charges. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the advance charges must be paid upon the articles actually shipped.

Sec. 8. If this bill of lading is issued on the order of the shipper, or his agent, in exchange or in substitution for another bill of lading, the shipper's signature on the prior bill of lading as to the statement of value or otherwise, or election for common law or bill of lading liability, in or in connection with such prior bill of lading, shall be considered a part of this bill of lading as fully as if the same were written or made in or in connection with this bill of lading.

Sec. 9. Any alteration, addition or erasure in this bill of lading which shall be made without the special notation hereon of the agent of the carrier issuing this bill of lading shall be without effect, and this bill of lading shall be enforceable according to its original tenor.

Sec. 10. Any controversy or claim arising out of or relating to this contract, the breach thereof, or the goods affected hereby, whether such claim be founded on or contract, shall be settled by arbitration under the Arbitration Law of the State of New York, and under the rules of the American Arbitration Association, provided however, that upon any such arbitration the arbitrator or arbitrators may not vary or modify any of the foregoing provisions.

Noted, however, that upon any such arbitration the arbitrator or arbitrators may not vary or modify any of the foregoing provisions.

VERIFIED COMPLAINT - CLASS ACTION

MEMO LETTER

FLAGG BROS. TRUCKING SERV., INC.
247 SO. FIFTH AVENUE - MOUNT VERNON, N. Y. 10550
Phone 668-9261

MESSAGE

REPLY

TO	DATE
Ms. Shirley Stone-Brooks	
DATE 8/22/73	
Dear Ms. Stone:	
Your account has to be brought	
up to date within 10 days of the date	
of this letter (Sept. 1, 1973) or	
your furn. will go up for sale.	
It, (your storage payments) have to	
be paid each month on the 1st and has	
to be kept up or your furniture will	
be sold. Your previous bal. from moving due	156.00
Storage for 7/73 & 8/73	150.00 @ 75.00 a mon
Respectfully yours, <i>Sam Flagg</i>	Total Due 306.00
SIGNED	SIGNED

RE AVAILABLE FROM SPATARC CO., INC.
THIRD AVE., 8 ELTH 32, N. Y.

THIS COPY FOR PERSON ADDRESSED

EXHIBIT "B"

FINAL NOTICE

FLAGG BROS. INC., MOVING and STORAGE

41 EAST 3rd ST. MT. VERNON, N.Y. 10550

Phone: (914) 668-9261 and (212) 324-5466

.....August 22.....1973

Shirley Brock Stone c/o M. Robinson

10 W. Sidney Ave.

Mt. Vernon, N.Y.

Dear Ms. Stone...

Your Storage Account, amounting to \$150.00..... is now seriously overdue, and we herewith request that you make a payment on same on or before Sept. 1, 1973.....

Unless such payment is made we will be obliged to advertise your goods for sale at public auction.

Thanking you for your immediate attention to this matter, we are

Very truly yours, W. Flagg, Pres.

(Read other side)

FLAGG BROS. INC., MOVING and STORAGE

46 E. Sidney Ave
Mt. Vernon NY 10550
Aug. 24, 1973

Glang Brothers
~~255 No 41 E 3rd St.~~
Mount Vernon NY 10550

Dear Sir

As per previous conversations via telephone and being repetitious - I must try one last time.

I informed you of your prices and how it was almost impossible to pay.

When you came to my apt. to put my furniture in storage you informed me that storage would be sixty five dollars; After putting all my furniture in your van one of your employees informed me of a new price as follows:
\$75.00/month storage

75.00 for flat packing and boxing
28.00 for fumigating.

I gave a check for what I believed at the time was for the payment in full. The beginning of the next week I wanted to

know how long this money would be good for. Your secretary informed me that I owed another \$56.00. When asked why I was informed that there were other things I had to pay for boxes etc. Also I was informed to come in. When I came to the office the story again was different from that of the original and the second conversation. I wanted to know where my furniture was stored and wanted to see it. I again was informed there was a fee of thirty five dollars to see also my furniture was in Harrison. Since then there has been numerous telephone calls and still different prices quoted.

I didn't wish to cause trouble but you are making it very difficult for me so as a last resort I'm letting you know my intentions. You and I both know your prices are atrocious for storage etc. I have checked into this area thoroughly and know you do not charge by the hour ~~for~~ to pick up and store furniture. This is something which is done by the

Amount of public gut.

It would be advisable for me to hear from you by return mail as to the amount of public gut of furniture and also for you to do something price wise since the first amount I gave me was to be the full amt. \$128.00. You also changed the storage price from \$15 to \$75 and quoted to me when I came to your office that "It's a shame you have to be a victim of circumstances even though it's our fault."

I expect an answer within five days or I will have to take further action and have you investigated by the F.C.C. and/or the P.S.C.

Thanking you in advance for letting me know something by mail within five days

Yours Truly
Mr. J. Brooks

VERIFIED COMPLAINT - CLASS ACTION

THE LEGAL AID SOCIETY OF WESTCHESTER COUNTY
56 GRAND STREET
WHITE PLAINS, NEW YORK 10601
(914) RO. 1-8200

August 23, 1973

Flagg Bros, Inc.
Moving & Storage
247 South 5th Ave.
Mt. Vernon, N. Y. 10550

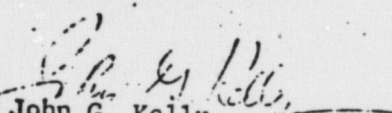
Re: Shirley Heiliott (Shirley Brooks Stone)
120 North Kensico Ave.
White Plains, N. Y.
(Formerly 33 N. Third Ave.)
(Mt. Vernon, N. Y.)

Gentlemen:

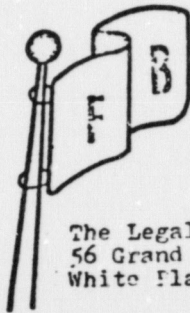
Mrs. Stone has consulted me regarding charges being made for furniture which she has stored with you. As I understand, she was originally given a storage charge of \$75. a month as indicated by the enclosed copy of your "Combined Uniform Household Goods Bill of Lading and Freight Bill." However, she states that since June 13, 1973 the price seems to increase everyday and that the only explanation she has been able to obtain is something to the effect that you are sorry for the different prices, but you are just a victim of circumstances.

I would appreciate your explanation of this situation - looked at from the standpoint of dollars as well as from what you determine to be your legal rights in order that I may be able to advise her further.

Very truly yours,


John G. Kelly
Attorney

JGK/ea



FLAGG BROS., INC. MOVING AND STORAGE

247 SOUTH 5th AVE. MOUNT VERNON, N. Y.

914 668-9261

212-324-5466

August 30, 1973

The Legal Aid Society of Westchester "County
56 Grand Street
White Plains, New York 10601

Re: Shirley Brooks Stone
120 N. Kensico Ave.
White Plains N.Y.
Formerly 33 N. 3rd Ave.
Mt. Vernon, N.Y.

Dear Sir:

As we explain over the telephone, our rates are by the hour.
For one (1) truck, three (3) men, we get \$32.00 an hour plus $\frac{1}{2}$ travel
time. As far as your Bill of Lading is concerned, because of the
circumstances and the hardship we were concerned at the time, we
charged for 3 men and a truck for 6 hours @\$28.00 an hour... \$168.00
plus $\frac{1}{2}$ hour travel time which was 14.00
She used 15 Barrels @\$2.00 ea. 30.00
6 Book Ctns @1.50 ea. 9.00
Matt.Ctns @6.00 ea. 30.00
As standard procedure - Fumigating 8.00

I'm sorry we do not charge by cubic feet and as far as storage is
concerned, we charge by the containers which is \$25.00 per container
per month. Ms. Stone gave \$178.00 as a deposit which left a balance
due on the original bill of \$156.00.

Coming out of storage; you'RE charges again are by the hour for
one (1) truck, three (3) men, @ \$32.00 an hour. Charges coming out of
storage estimated to be 5 $\frac{1}{2}$ hours $\frac{1}{2}$ travel time @ \$32.00 an hour which
these charges brings a total of \$176.00
7/73, 8/73 Storage due 150.00
Balance from old bill 156.00
\$482.00

We must be paid in cash upon delivery before the furniture is un-
loaded from the truck.

Her storage bill is past due and must be brought up to date
immediately to avoid the sale of her furniture, or before we initiate
public auction proceedings.

Respectfully yours,

Henry Flagg
Henry Flagg, President

FLAGG BROS., INC. MOVING & STORAGE

HF/mgd

cc: Ms. Shirley Stone Brooks
"LARGE OR SMALL, WE MOVE THEM ALL"

LIST OF ITEMS LISTED IN EXHIBIT "G"

3	Bedsprings	
2	Mattress	
2	Mirrors	
1	Dresser	
2	Chest	
1	Sofabed	
4	Kit. Chairs	
11	Barrels	cu
3	Rugs	
2	Padings	
1	Bar	
1	Side chair	
3	Room dividers	
6	Trays	
1	Club chair	
1	Iron bod.	
1	Shopping cart	
2	Night stand	
3	Bed rail	
1	Round table top	
6	Book cartons	cu
2	Books	cu
1	Oven toy	
2	Bar stools	
	Table frames	
2	Side chairs	
1	High shelf	
	Sofa on rock	

ANSWER OF DEFENDANT FLAGG BROS. AND HENRY FLAGG

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
SHIRLEY HERRIOTT BROOKS, individually :
and on behalf of all others similarly :
situated, :

Civil Action
File No.
73 Civ. 4050

Plaintiffs, :

- against - :

FLAGG BROTHERS, INC., individually :
and as representative of a class of :
all others similarly situated, and :
HENRY FLAGG, individually and as :
President of Flagg Brothers, Inc., :

ANSWER OF
DEFENDANTS
FLAGG BROTHERS,
INC. and HENRY
FLAGG

Defendants, :

- and - :

LOUIS J. LEFKOWITZ, as Attorney :
General of the State of New York, :

Intervenor-Defendant. :
-----X

Defendants FLAGG BROTHERS, INC., individually
and as representative of a class of all others similarly
situated and HENRY FLAGG, individually and as President
of Flagg Brothers, Inc. for their answer to the complaint
allege:

1. Admit the allegations contained in Paragraph
"1" of the complaint except denies that New York Uniform
Commercial Code Section 7-209 and 7-210 violate any pro-
vision of the United States Constitution; admit the alle-
gations contained in Paragraphs "10", "11", "20", "22",
"23" and "24" of the complaint.

2. Deny knowledge or information sufficient

to form a belief as to Paragraphs "9", "12", "13", "17" and "18".

3. Deny each and every allegation contained in Paragraphs "2" through and including "8", "14", "15", "16", "19", "25" and "26" through and including "31" of the complaint.

FIRST DEFENSE

4. The complaint fails to state a claim upon which relief can be granted, in that the plaintiff and all members of the represented class of plaintiffs as owners of warehoused goods are not constitutionally entitled to an opportunity for a judicial hearing prior to a foreclosure of a warehouseman's lien on the goods.

SECOND DEFENSE

5. That the New York Commercial Code Sections 7-209 and 7-210 afford a warehouse depositor such notice and opportunity to be heard as meets with the requirements under the United States Constitution.

THIRD DEFENSE

6. The Court lacks jurisdiction over the subject matter of the action because jurisdiction is invoked on the ground that the action arises under the Constitution and Laws of the United States and whereas the amount actually in controversy as to the named plaintiff's claim is less than TEN THOUSAND (\$10,000.00) DOLLARS exclusive of interest and costs.

7. The Court does not have jurisdiction over the subject matter of the action in the absence of the

jurisdictional amount.

FOURTH DEFENSE

8. The acts of which the plaintiff complains consisting of the alleged detention of plaintiff's goods and those of all others similarly situated and their alleged forced sale without adequate notice and opportunity for a judicial hearing prior to lien sale, are in the nature of private acts by private individuals and do not partake of state action as required by the 14th Amendment of the United States Constitution.

WHEREFORE, Defendants, FLAGG BROTHERS, INC. and HENRY FLAGG, respectfully request:

to a fore-(1) That the Court enter judgment dismissing the actions in 73 Civ. 4050 upon the following grounds:

(a) the complaint fails to state a claim upon which relief can be granted;

(b) the Court lacks subject matter jurisdiction over either action;

(c) the required state action under the 14th Amendment is lacking;

(2) That the Court enter judgment finding Sections 7-209 and 7-210 of the Uniform Commercial Code of the State of New York to be constitutional under the due process and equal protection clauses in Amendment XIV to the United States Constitution;

(3) That the Court grant no relief to plaintiff or any others similarly situated whom either

plaintiff seeks to represent.

(4) That the Court grant Defendants such other and further relief as may be proper.

Dated: New York, New York
March 29, 1974

ALVIN ALTMAN
BRODSKY, LINETT & ALTMAN
Attorneys for Defendants
FLAGG BROTHERS, INC. and
HENRY FLAGG
Office & P. O. Address
1776 Broadway
New York, New York 10019
212-245-7700

ANSWER OF DEFENDANT AMERICAN WAREHOUSEMAN'S AND INTERNATIONAL
ASSOCIATION OF REFRIGERATED WAREHOUSES, INC.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SHIRLEY HERRIOTT BROOKS, individually
and on behalf of all others similarly
situated,

Plaintiffs,

- against -

FLAGG BROTHERS, INC., individually
and as representative of a class of
all others similarly situated, and
HENRY FLAGG, individually and as
President of Flagg Brothers, Inc.,

Defendants,

- and -

LOUIS J. LEFKOWITZ, as Attorney
General of the State of New York,

Intervenor-Defendant,

- and -

AMERICAN WAREHOUSEMEN'S ASSOCIATION
and INTERNATIONAL ASSOCIATION OF
REFRIGERATED WAREHOUSES, INC., not-
for-profit corporations,

Intervening Defendants.

Civil Action
File No.
73 Civ. 4050

ANSWER OF AMERICAN
WAREHOUSEMEN'S and
INTERNATIONAL
ASSOCIATION OF RE-
FRIGERATED WAREHOUSE-
INC.

AMERICAN WAREHOUSEMEN'S and INTERNATIONAL ASSOCIATION
OF REFRIGERATED WAREHOUSES, INC., intervening defendants, answer
the Complaint in this action as follows:

1. Admit that Plaintiff seeks class action status
and the relief requested in paragraph 1 of the Complaint, but
deny that New York Uniform Commercial Code Sections 7-209 and 7-210
violate any provisions of the United States Constitution.
2. Deny knowledge or information sufficient to form a
belief as to paragraphs 9 through and including 26 of the Complaint.
3. Deny each and every allegation contained in paragraphs
2 through and including 8 and 27 through and including 31 of the Com-
plaint.

FIRST DEFENSE

4. The Complaint fails to state a claim upon which relief can be granted, in that the Plaintiff and all members of the represented class of plaintiffs as owners of warehoused goods are not constitutionally entitled to an opportunity for a judicial hearing prior to the imposition or foreclosure of a warehouseman's lien on the goods.

SECOND DEFENSE

5. That the New York Uniform Commercial Code Sections 7-209 and 7-210 afford a warehouse depositor such notice and opportunity to be heard as meets the requirements under the United States Constitution.

THIRD DEFENSE

6. The Court lacks jurisdiction over the subject matter of the action because jurisdiction is invoked on the ground that the action arises under the Constitution and Laws of the United States and the amount actually in controversy as to the named Plaintiff's claims is less than Ten Thousand Dollars (\$10,000.00) exclusive of interests and costs.

7. The Court does not have jurisdiction over the subject matter of the action in the absence of the jurisdictional amount.

FOURTH DEFENSE

8. The acts of which the Plaintiff complains consisting of the alleged detention of Plaintiff's goods and those of all others similarly situated and their alleged forced sale without adequate notice and opportunity for a judicial hearing prior to lien sale, are in the nature of private acts by private individuals and do not partake of state action as required by the 14th Amendment of the United States Constitution.

NOTICE OF MOTION FOR LEAVE TO INTERVENE OF WAREHOUSEMEN'S
ANSWER OF DEFENDANT AMERICAN WAREHOUSEMEN'S AND
INTERNATIONAL ASSOCIATION OF REFRIGERATED WAREHOUSES, INC.

WHEREFORE, Intervening Defendants, AMERICAN WAREHOUSE-
MEN'S ASSOCIATION and INTERNATIONAL ASSOCIATION OF REFRIGERATED
WAREHOUSES, INC., respectfully request:

(1) That the Court enter judgment dismissing the actions
in 73 Civ. 4050 upon the following grounds:

(a) the Complaint fails to state a claim upon
which relief can be granted;

(b) the Court lacks subject matter jurisdiction
over either action;

(c) the required state action under the 14th
Amendment is lacking;

(2) That the Court enter judgment finding Sections
7-209 and 7-210 of the Uniform Commercial Code of the
State of New York to be constitutional under the due
process and equal protection clauses in Amendment XIV
to the United States Constitution;

(3) That the Court grant no relief to Plaintiff or
any others similarly situated whom Plaintiff seeks to
represent.

(4) That the Court grant Intervening Defendants such
other and further relief as may be proper.

Respectfully submitted,

AMERICAN WAREHOUSEMEN'S ASSOCIATION
and INTERNATIONAL ASSOCIATION OF
REFRIGERATED WAREHOUSES, INC.

By

WILLIAM H. TOWLE
HARDMAN, BURKE, KERWIN & TOWLE
Their Attorneys
12 North Dearborn Street
Chicago, Illinois 60602
(312) 332-5106
and

By

MARTIN WERNER
WERNER & WEISS
Their Attorneys
2 West 45th Street
New York, New York 10036
(212) 697-6969

DATED: April , 1974.

PLAINTIFF CLASS ACTION STIPULATION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
SHIRLEY HERRIOTT BROOKS, VIVIAN MORANT,
individually and on behalf of all others
similarly situated,

Plaintiffs,

-against-

FLAGG BROTHERS, INC., ALLIANCE FIREPROOF
WAREHOUSE, INC., UNIQUE MOVING AND
STORAGE CO. INC., individually and as
representative of a class of all others
similarly situated, HENRY FLAGG,
individually and as President of Flagg
Brothers, Inc, and MICHAEL ROSS,

Defendants,

and

NEW YORK STATE MOVERS & WAREHOUSEMAN'S
ASSOCIATES, INC.,

Intervenor-Defendant.

CLASS ACTION

STIPULATION

PLAINTIFF CLASS

73 CIV. 4050

-----X
IT IS HEREBY STIPULATED AND AGREED by and
between the attorneys for the parties in the above entitled
action that this consolidated action is a proper class action
pursuant to Rule 23 of the Federal Rules of Civil Procedure.

The members of the plaintiff class consists of
all persons whose property is stored in a warehouse located in
the State of New York and whose property has been encumbered
by a lien pursuant to New York Uniform Commercial Code §7-209
and subject to sale pursuant to New York Uniform Commercial
Code §7-210 because of warehouse fees allegedly due without
prior notice and an opportunity for a judicial hearing prior to
the imposition of the lien and the sale of the goods.

This action is a proper class action because:

(a) the class is so numerous that joinder of all members is impracticable; (b) there are questions of law common to the class, namely the constitutional validity of the New York Uniform Commercial Code §§ 7-209 and 7-210; (c) the claim of the representative plaintiffs are typical of the claims of the members of the class; (d) The Legal Aid Society of Westchester County, attorney for plaintiffs, will fairly and adequately protect the interests of the class; and (e) defendants, in failing to provide plaintiffs with an opportunity to be heard prior to the imposition of a lien on and sale of plaintiffs' property, have acted and refused to act on grounds generally applicable to the class.

This action is a proper class action only with respect to plaintiffs' claims for injunctive and declaratory relief and not with respect to plaintiff Brooks' claim for damages or to plaintiff Morant's claim for damages.

/s/ Martin A. Schwartz

GENE F. REIBMAN & MARTIN A. SCHWARTZ,
of counsel

THE LEGAL AID SOCIETY OF WESTCHESTER
COUNTY

Attorneys for Plaintiff Brooks

Office & P.O. Address

56 Grand Street

White Plains, New York 10601

(914) 761 - 9200

PAGE 34

/s/ Louis B. York

LOUIS B. YORK, ESQ.

Attorney for Plaintiff Morant

Manhattan Legal Services Corp.

170 East 116th Street

New York, New York 10029

(212) 427 - 0693

Linett & Altman, Michael H. Baines

BRODSKY, LINETT & ALTMAN
Attorneys for Defendants Flagg,
Flagg Brothers, Inc., and
Intervenor-Defendant, New York
State Movers & Warehouseman's
Associates, Inc.

1776 Broadway
New York, New York 10019
(212) 245 - 7700

Ivan Tantleff, Michael H. Baines

IVAN TANTLEFF
Attorney for Alliance Fireproof
Warehouse, Inc., Unique Moving
& Storage Co., Inc., and
Michael Ross

32 Court Street
Brooklyn, New York 11201
(212) 522 - 4604

DATED: February 1974

SO ORDERED:

U. S. DISTRICT COURT JUDGE

PLAINTIFF'S INTERROGATORIES

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SHIRLEY HERRIOTT BROOKS, individually
and on behalf of all others similarly
situated,

Plaintiffs,

-against-

FLAGG BROTHERS, INC., individually and
as representative of a class of all
others similarly situated, HENRY FLAGG,
individually and as President of Flagg
Brothers, Inc., and JAMES A. LEVISTER,
individually and as City Marshall of
the City of Mount Vernon, New York,

Defendants.

INTERROGATORIES

73 Civ. 4050 C.H.T.

TO: RICHARD GATES, ESQ.
ARRON, BRUMAN & GATES
38 North Broadway
Jericho, New York 11753
Attorney for Defendants, Flagg Brothers, Inc.
and Henry Flagg

DAVID HOFFENBERG, ESQ.
Law Department
City Hall
Mount Vernon, New York 10550
Attorney for Defendant Levister

The plaintiffs in the above entitled action request
that defendant, Henry Flagg, answer under oath the following
interrogatories in accordance with Rule 33 of the Federal Rules
of Civil Procedure:

1. State the exact or approximate number of contracts
for moving and storage entered into by Flagg Brothers during
(a) 1971, (b) 1972, and (c) 1973. If the exact or approximate
number is not known and is not reasonably ascertainable, state
whether the numbers are in excess of (a) 50, (b) 100, (c) 200,
(d) 500, (e) 1,000, (f) 2,000.

PLAINTIFF'S INTERROGATORIES

2. State the exact or approximate number of "Final Notices" (Exhibit "C" to complaint herein) given to customers of Flagg Brothers, Inc. by Flagg Brothers, Inc. during (a) 1971, (b) 1972, and (c) 1973. If the exact or approximate number is not known, state whether the numbers are in excess of (a) 50, (b) 100, (c) 200, (d) 500, (e) 1,000, (f) 2,000.

3. State the exact or approximate numbers of sales pursuant to New York U.C.C. §7-210 to authorize the liens authorized by New York U.C.C. §7-209 made by defendant Flagg Brothers during (a) 1971, (b) 1972, and (c) 1973.

PLEASE TAKE NOTICE, that a copy of the answer to the above interrogatories must be served upon the undersigned within 30 days after the service of these interrogatories.

Dated: December 13, 1973

THE LEGAL AID SOCIETY OF
WESTCHESTER COUNTY
Attorneys for Plaintiffs
by: Gene F. Reibman, of Counsel
Martin A. Schwartz, of Counsel
Office and P. O. Address
56 Grand Street
White Plains, New York 10601
Tel. (914) 761-9200

DEFENDANT FLAGG'S ANSWER TO PLAINTIFF'S INTERROGATORIES.

201
1/6/74
UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

-----x
SHIRLEY HERRIOTT BROOKS, individually
and on behalf of all others similarly
situated,

73 CIV. 4050

Plaintiffs,

- against -

ANSWER TO PLAINTIFF'S
INTERROGATORIES

FLAGG BROTHERS, INC., individually and
as representative of a class of all others
similarly situated, HENRY FLAGG, individu-
ally and as President of Flagg Brothers,
Inc., and JAMES A. LEVISTER, individually
and as City Marshall of the City of Mount
Vernon, New York,

Defendants.
-----x

TO: THE LEGAL AID SOCIETY OF WESTCHESTER COUNTY
56 Grand Street
White Plains, New York 10601
Attorneys for Plaintiffs

DAVID HOFFENBERG, ESQ.
Law Department
City Hall
Mount Vernon, New York 10550
Attorney for Defendant Levister

The defendant HENRY FLAGG responding to the inter-
rogatories of the plaintiff alleges as follows:

1. (a) In the year 1971, approximately 304 contracts
for moving and approximately 43 contracts for storage
were entered into by FLAGG BROTHERS, INC.

(b) In the year 1972, approximately 529 contracts
for moving and approximately 70 contracts for storage were
entered into by FLAGG BROTHERS, INC.

(c) In the year 1973, approximately 567 contracts
for moving and approximately 70 contracts for storage were
entered into by FLAGG BROTHERS, INC.

2. (a) In the year 1971 there were no "Final Notices"
given to customers of FLAGG BROTHERS, INC.

(b) In the year 1972, there were no "Final Notices"
given to customers of FLAGG BROTHERS, INC.

DEFENDANT FLAGG'S ANSWER TO PLAINTIFF'S INTERROGATORIES

(c) In the year 1973, there were approximately 65 "Final Notices" given to customers of FLAGG BROTHERS, INC.

3. (a) In the year 1971, there were no sales pursuant to New York Uniform Commercial Code Section 7-210.

(b) In the year 1972, there were no sales pursuant to New York Uniform Commercial Code Section 7-210.

(c) In the year 1973, there were approximately 18 sales.

Dated: , New York
14, 1974

Walter Flaggs, Jr.
Attorney for Plaintiff

DAVID HOFFENBERG
Law Department
City Hall
Room 1200
Attorney for Defendant

ALVIN ALTMAN
BRODSKY, LINETT & ALTMAN
Attorneys for defendants
FLAGG BROTHERS, INC. and
HENRY FLAGG
Office & P. O. Address
1776 Broadway
New York, New York 10019

212/245-7700

MOTION TO INTERVENE AND SUPPORTING AFFIDAVITS OF ATTORNEY
GENERAL OF NEW YORK

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SHIRLEY HERRIOTT BROOKS, individually and
on behalf of all others similarly
situated,

Plaintiffs,

-against-

FLAGG BROTHERS, INC., individually and
as representative of a class of all
others similarly situated, HENRY FLAGG,
individually and as President of Flagg
Brothers, Inc., and JAMES A. LEVISTER,
individually and as City Marshall of
the City of Mount Vernon, New York,

Defendants.

NOTICE OF MOTION
FOR LEAVE TO
INTERVENE

73 Civ. 4050
CMT

S I R S :

PLEASE TAKE NOTICE that upon the annexed affidavit of
A. SETH GREENWALD, sworn to February 6, 1974 the undersigned
will make a motion for leave to intervene pursuant to Rule 24 of
the F.R.C.P. at the United States Courthouse, Foley Square,
New York, New York 10007 on the 22nd day of February, 1974 at
10:00 o'clock in the forenoon or as soon thereafter as counsel
may be heard for an order allowing the Attorney General of the
State of New York to intervene in defense of the constitution-
ality of Uniform Commercial Code §§ 7-209, 7-210 and for such
other and further relief as the court may deem just and proper.

Dated: New York, New York
February 6, 1974

Yours, etc.,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Pro Se
Proposed Intervenor
by

A. SETH GREENWALD
Assistant Attorney General
Office & P.O. Address
Two World Trade Center
New York, New York 10047
Tel. No. 488-3396

MOTION TO INTERVENE AND SUPPORTING AFFIDAVITS OF
ATTORNEY GENERAL OF NEW YORK

TO: MARTIN A. SCHWARTZ
The Legal Aid Society
of Westchester County
Attorney for Plaintiffs
56 Grand Street
White Plains, New York 10601

BRODSKY, LINETT & ALTMAN, ESQS.
Attorneys for Defendant
Flagg Brothers, Inc.
1776 Broadway
New York, New York

MOTION TO INTERVENE AND SUPPORTING AFFIDAVITS OF
ATTORNEY GENERAL OF NEW YORK

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SHIRLEY HERRIOTT BROOKS, individually
and on behalf of all others similarly
situated,

Plaintiffs,

-against-

FLAGG BROTHERS, INC., individually and
as representative of a class of all
others similarly situated, HENRY FLAGG,
individually and as President of Flagg
Brothers, Inc., and JAMES A. LEVISTER,
individually and as City Marshall of
the City of Mount Vernon, New York,

Defendants.

AFFIDAVIT

73 Civ. 4050
CMT

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

A. SETH GREENWALD, being duly sworn, deposes and

says:

I am an Assistant Attorney General of the State of
New York and make this affidavit in support of the Attorney
General of the State of New York's motion to intervene.

The Attorney General under Executive Law § 71 has
an obligation to defend the constitutionality of the laws of
the State of New York. This is similar to F.R.C.P. 24(c), on
giving notice to the Attorney General of the United States.
Pursuant to Rule 24(b), F.R.C.P., the Attorney General of the
State of New York should be allowed to intervene because the
defendants are expected to rely on a state statute, Uniform
Commercial Code, §§ 7-209 and 7-210 as a defense. Executive Law
§ 71 contemplates that only the Attorney General can adequately

MOTION TO INTERVENE AND SUPPORTING AFFIDAVITS OF
ATTORNEY GENERAL OF NEW YORK

defend constitutionality of a state law. The defendants may assert compliance with U.C.C. § 7-210 and therefore will be relying on a "state or ... requirement or agreement issued or made pursuant to the statute..." F.R.C.P. 23(b). Permissive intervention is appropriate. See 33 Moore's Federal Practice § 24.10[5] and cases cited therein.

I should also remind the court that none of the present parties have raised any objection to this motion.

WHEREFORE, your deponent respectfully requests that the motion to intervene be granted.

15/
A. SEYMOUR GREENWALD

Sworn to before me this
6th day of February, 1974

St Robert S. Hammer
Assistant Attorney General
of the State of New York

MOTION TO INTERVENE AND SUPPORTING AFFIDAVITS OF
ATTORNEY GENERAL OF NEW YORK

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SHIRLEY HERRIOTT BROOKS, individually
and on behalf of all others similarly
situated,

Plaintiffs,

-against-

PLAGG BROTHERS, INC., individually and
as representative of a class of all
others similarly situated, HENRY PLAGG,
individually and as President of Plagg
Brothers, Inc., and JAMES A. LEVISTER,
individually and as City Marshall of
the City of Mount Vernon, New York,

Defendants.

ORDER

73 Civ. 4050
CMT

The motion of the Attorney General of the State
of New York for leave to intervene in this action in defense
of constitutionality is hereby granted and the form of
answer of said movant attached to and filed with this motion
for leave to intervene shall be and is filed and shall be
treated for all purposes as the answer of said movant.

Dated: , 1974

15/

CHARLES H. TERRY
United States District Judge

NOTICE OF MOTION FOR LEAVE TO INTERVENE OF WAREHOUSEMAN'S
ASSOCIATION OF THE PORT OF NEW YORK AND THE COLD STORAGE
WAREHOUSEMEN'S ASSOCIATION OF THE PORT OF NEW YORK

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
SHIRLEY HERRIOTT BROOKS, individually :
and on behalf of all others similarly :
situated, :

Plaintiffs, :

-against- :

NOTICE OF MOTION
FOR LEAVE TO
INTERVENE

FLAGG BROTHERS, INC., individually and :
as representative of a class of all :
others similarly situated, HENRY FLAGG, :
individually and as President of Flagg :
Brothers, Inc., and JAMES A. LEVISTER, :
individually and as City Marshall of :
the City of Mount Vernon, New York, :

73 Civ. 4050

Defendants, :

-and- :

LOUIS J. LEFKOWITZ, Attorney General, :

Intervenor-Defendant. :

-----X
S I R S :

PLEASE TAKE NOTICE, that upon the annexed affidavit of
ARNOLD H. SHAW, sworn to April 11, 1974, the undersigned
will make a motion for leave to intervene pursuant to Rule 24
of the Federal Rules of Civil Procedure at Room 2904, the United
States Courthouse, Foley Square, New York, New York 10007 on the
24th day of April, 1974 at 10 o'clock in the forenoon or as
soon thereafter as counsel may be heard for an order allowing the
Warehousemen's Association of the Port of New York, Inc., and the
Cold Storage Warehousemen's Association of the Port of New York

NOTICE OF MOTION FOR LEAVE TO INTERVENE OF WAREHOUSEMAN'S
ASSOCIATION OF THE PORT OF NEW YORK AND THE COLD STORAGE
WAREHOUSEMEN'S ASSOCIATION OF THE PORT OF NEW YORK

to intervene in defense of the constitutionality of Uniform
Commercial Code Sections 7-209 and 7-210, and for such other and
further relief as the Court may deem just and proper.

Dated: New York, New York
April 11, 1974

Yours, etc.

JAI FE, SHAW & ROSENBERG,
Attorneys for the Warehouse-
men's Association of the
Port of New York, Inc. and
the Cold Storage Warehouse-
men's Association of the Port
of New York
Office & P. O. Address
51 Madison Avenue
New York, N. Y. 10010
Telephone: 212-683-0275

To: The Legal Aid Society of
Westchester County,
Gene F. Reibman, Esq. and Martin
A. Schwartz, Esq. of Counsel
Attorneys for Plaintiffs
56 Grand Street
White Plains, N.Y. 10601

Brodsky, Linett & Altman, Esqs.,
Attorneys for Defendants
1776 Broadway
New York, N.Y. 10019

Hon. Louis J. Lefkowitz,
Attorney General of the State
of New York,
Intervenor-Defendant
2 World Trade Center
New York, N.Y. 10047

NOTICE OF MOTION FOR LEAVE TO INTERVENE OF WAREHOUSEMAN'S
ASSOCIATION OF THE PORT OF NEW YORK AND THE COLD STORAGE
WAREHOUSEMEN'S ASSOCIATION OF THE PORT OF NEW YORK

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
:
SHIRLEY HERRIOTT BROOKS, individually
and on behalf of all others similarly
situated, :

Plaintiffs, :

-against- :

FLAGG BROTHERS, INC., individually and
as representative of a class of all
others similarly situated, HENRY FLAGG,
individually and as President of Flagg
Brothers, Inc., and JAMES A. LEVISTER,
individually and as City Marshall of
the City of Mount Vernon, New York, :

Defendants. :

-and- :

LOUIS J. LEFKOWITZ, Attorney General, :

Intervenor-Defendant. :

AFFIDAVIT

73 Civ. 4050

-----X
STATE OF NEW YORK)
ss.:
COUNTY OF NEW YORK)

ARNOLD H. SHAW, being duly sworn, deposes and says:

I am a member of the firm of Jaffe, Shaw & Rosenberg,
attorneys for the movants hereinafter named and I make this
affidavit in support of their motion to intervene.

The Warehousemen's Association of the Port of New York
(hereinafter referred to as the "Association") is a membership
corporation of the State of New York. The Cold Storage Warehouse-
men's Association of the Port of New York (hereinafter referred
to as the "Cold Storage Association") is an unincorporated

NOTICE OF MOTION FOR LEAVE TO INTERVENE OF WAREHOUSEMAN'S
ASSOCIATION OF THE PORT OF NEW YORK AND THE COLD STORAGE
WAREHOUSEMEN'S ASSOCIATION OF THE PORT OF NEW YORK

association. The Association is a trade association consisting of many public warehousemen doing business in the City of New York and in the metropolitan New Jersey area who are engaged in the commercial warehousing business. These members store, handle and distribute merchandise, commodities and materials of every character and description. The Cold Storage Association is also a trade association. Its members do business in the same vicinity, and their activities consist primarily of the storage, handling and distribution of perishable foods and other commodities that require refrigerated facilities for their storage. Both of the movants store, handle and distribute goods, wares, merchandise, materials and commodities primarily for and on behalf of merchants and other commercial and business entities who are engaged in interstate and international commerce. The movants' members are, accordingly, a vital adjunct to the normal flow and functioning of business and commerce in the metropolitan New York and New Jersey areas. For example, many of the customers (bailors) of the members of both movants are importers who store their goods in United States customs bonded facilities maintained by many of movants' members.

The main thrust of the complaint, is to achieve a judicial declaration of unconstitutionality of two sections of the Uniform Commercial Code, Sections 7-209 and 7-210. Section 7-209 provides for a warehouseman's lien, and Section 7-210 sets forth the method of enforcement of the lien. It goes without saying, therefore, that an adjudication of invalidity on constitutional grounds would have consequences that far transcend

NOTICE OF MOTION FOR LEAVE TO INTERVENE OF WAREHOUSEMAN'S
ASSOCIATION OF THE PORT OF NEW YORK AND THE COLD STORAGE
WAREHOUSEMEN'S ASSOCIATION OF THE PORT OF NEW YORK

the rights of the plaintiffs and the defendants, and would vitally affect the rights and interests not only of the members of the Association and the Cold Storage Association, but of all public warehousemen doing business in the entire metropolitan area and, indeed, in virtually the entire nation, the Uniform Commercial Code having been adopted by all states, with the exception of Louisiana, and by the District of Columbia and the Virgin Islands. (5 Bender's U.C.C. Service, ¶11.05).

If Sections 7-209 and 7-210 are declared unconstitutional, the consequences to the commercial public warehouse industry would be devastating. From time immemorial, public warehousemen have depended upon the security of the warehousemen's lien in readily taking into their establishments for storage goods of every description from all types of bailors. Without the lien, warehousemen would, of necessity, be required to be selective, and to limit their receipt of goods only to those merchants, entrepreneurs and other persons who either belong to the financially elite, or to those who would be in a position to produce a surety bond or other acceptable guarantee of payment. This would not only ruinously curtail the business of every warehouseman, but it would seriously interfere with and disrupt trade, commerce and industry.

I recognize that the principal defendant herein, Flagg Brothers, Inc. has interposed a defense "individually and as representative of a class of all others similarly situated". It is respectfully submitted, however, that the members of the

NOTICE OF MOTION FOR LEAVE TO INTERVENE OF WAREHOUSEMAN'S
ASSOCIATION OF THE PORT OF NEW YORK AND THE COLD STORAGE
WAREHOUSEMEN'S ASSOCIATION OF THE PORT OF NEW YORK

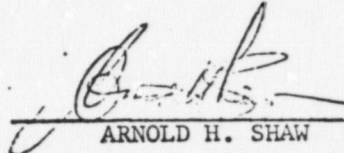
Association and the Cold Storage Association are not situated similarly to the defendant, Flagg Brothers, Inc. It is true that Flagg Brothers is a public warehouseman entitled to a warehousemen's lien and the enforcement thereof under the subject U.C.C. sections, but this is where the similarity ends. The defendant, Flagg Brothers, upon information and belief, is engaged in the storage and moving of furniture and household furnishings and as such, it deals primarily with members of the general public. The membership of the Association and the Cold Storage Association, however, as already indicated, differ from the defendant, Flagg Brothers, in that they deal primarily with goods that are in trade, commerce and industry. Therefore, the membership of the Association and the Cold Storage Association is not adequately represented in the within action and yet, these members have a vital stake in the outcome of the litigation insofar as the issue of constitutionality of Sections 7-209 and 7-210 of the Uniform Commercial Code are concerned.

From all of the foregoing, it is clear that the moving parties' defense and the main action have a question of law in common and, accordingly, intervention is appropriate pursuant to Rule 24, FRCP.

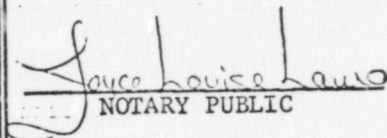
It is the intention of the movants to limit their participation herein to the question of constitutionality. They do not intend to become involved in the other factual issues. The rights of the original parties, therefore, cannot conceivably be delayed or prejudiced.

NOTICE OF MOTION FOR LEAVE TO INTERVENE OF WAREHOUSEMAN'S
ASSOCIATION OF THE PORT OF NEW YORK AND THE COLD STORAGE
WAREHOUSEMEN'S ASSOCIATION OF THE PORT OF NEW YORK

WHEREFORE, I respectfully request that the motion of
the Warehousemen's Association of the Port of New York, Inc. and
the Cold Storage Warehousemen's Association of the Port of New
York to intervene be granted.


ARNOLD H. SHAW

Sworn to before me this
11th day of April, 1974.


NOTARY PUBLIC

JOYCE LOUISE LAURO
Notary Public, State of New York
No. 24-2271225
Qualified in Kings County
Commission Expires March 30, 1975

NOTICE OF MOTION FOR LEAVE TO INTERVENE OF WAREHOUSEMAN'S
ASSOCIATION OF THE PORT OF NEW YORK AND THE COLD STORAGE
WAREHOUSEMEN'S ASSOCIATION OF THE PORT OF NEW YORK

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
SHIRLEY HERRIOTT BROOKS, individually :
and on behalf of all others similarly :
situated, :

Plaintiffs, :

-against- :

INTERVENOR'S
ANSWER

FLAGG BROTHERS, INC., individually and :
as representative of a class of all :
others similarly situated, HENRY FLAGG, :
individually and as President of Flagg :
Brothers, Inc., and JAMES A. LEVISTER, :
individually and as City Marshall of :
the City of Mount Vernon, New York, :

73 Civ. 4050

Defendants. :

-and- :

LOUIS J. LEFKOWITZ, Attorney General, :

Intervenor-Defendant. :

-----X
The Warehousemen's Association of the Port of New
York, Inc. and the Cold Storage Warehousemen's Association of
the Port of New York answering the complaint herein allege:

1. Deny each and every allegation contained in
Paragraphs 1 through 4 of the complaint.
2. Deny having knowledge or information sufficient
to form a belief as to the truth of the allegations contained
in Paragraphs 5 through 27 of the complaint.
3. Deny each and every allegation contained in
Paragraphs 28 through 30 of the complaint.
4. Deny having knowledge or information sufficient

NOTICE OF MOTION FOR LEAVE TO INTERVENE OF WAREHOUSEMAN'S
ASSOCIATION OF THE PORT OF NEW YORK AND THE COLD STORAGE
WAREHOUSEMEN'S ASSOCIATION OF THE PORT OF NEW YORK

to form a belief as to the truth of the allegations contained in
Paragraph 31 of the complaint.

FIRST DEFENSE

5. Section 7-209 and Section 7-210 of the Uniform
Commercial Code do not offend the due process and equal protection
clauses of the Fourteenth Amendment to the United States
Constitution in that the bailor of goods stored in a warehouse
is afforded ample opportunity to be heard for the purpose of
contesting the validity of a lien and a sale by way of enforce-
ment thereof inasmuch as reasonable notice and advertising in
advance of the actual sale are required.

SECOND DEFENSE

6. This court lacks jurisdiction in that the matter
in controversy may properly be brought before a state or local
court where a full and adequate remedy is available to the
individual plaintiff.

THIRD DEFENSE

7. The claim of unconstitutionality is frivolous,
and its insertion in the complaint does not alter the fact that
the amount in controversy is less than \$10,000.00, exclusive of
interest and costs, and that the essential element of diversity
is lacking.

FOURTH DEFENSE

8. The controversy herein relates exclusively to
allegations of acts by private individuals and actions by
agencies of the State of New York or of any of its political

NOTICE OF MOTION FOR LEAVE TO INTERVENE OF WAREHOUSEMAN'S
ASSOCIATION OF THE PORT OF NEW YORK AND THE COLD STORAGE
WAREHOUSEMEN'S ASSOCIATION OF THE PORT OF NEW YORK

sub-divisions are not involved; therefore, the Fourteenth
Amendment of the United States Constitution is inapplicable.

FIFTH DEFENSE

9. The action is inappropriate for a class action
relief as the granting of plaintiffs' demand that Sections 7-209
and 7-210, Uniform Commercial Code be declared unconstitutional
would directly affect commercial and refrigerated warehouses
whose businesses are dissimilar to the business of the defendants
but who are, nevertheless bound by and subject to Sections 7-209
and 7-210, supra.

SIXTH DEFENSE

10. The action is inappropriate for a class action
for the further reasons that whereas, upon information and
belief, the defendants and others similarly situated are engaged
primarily in local and intrastate activity, the members of the
commercial and refrigerated industry represented by movants are
engaged primarily in interstate commerce, and, in addition,
whereas the defendants and others similarly situated deal
primarily with consumers and the general public, the members of
the commercial and refrigerated industry represented by movants
deal primarily with merchants and others engaged in industry
and commerce, yet, a declaration of unconstitutionality of
Sections 7-209 and 7-210, supra, would directly and adversely
affect the commercial and refrigerated warehouses.

WHEREFORE, it is respectfully requested that the

NOTICE OF MOTION FOR LEAVE TO INTERVENE OF WAREHOUSEMAN'S
ASSOCIATION OF THE PORT OF NEW YORK AND THE COLD STORAGE
WAREHOUSEMEN'S ASSOCIATION OF THE PORT OF NEW YORK

complaint herein to the extent that it seeks a declaration of
constitutional invalidity of Sections 7-209 and 7-210 of the
Uniform Commercial Code be dismissed.

JAFFE, SHAW & ROSENBERG,
Attorneys for Warehousemen's
Association of the Port of New
York, Inc. and Cold Storage
Warehousemen's Association of
the Port of New York

By 

ARNOLD H. SHAW, a Partner

Office & P. O. Address
51 Madison Avenue
New York, N. Y. 10010
Telephone No. 212-683-0275

NOTICE OF MOTION TO INTERVENE AS DEFENDANTS AND SUPPORTING

AFFIDAVITS OF INTERNATIONAL ASSOCIATION OF REFRIGERATED
WAREHOUSES, INC., AND AMERICAN WAREHOUSEMAN'S ASSOCIATION

UNITED STATES DIST ICT COURT
SOUTHERN DISTRICT OF NEW YORK

SHIRLEY HERRIOTT BROOKS, individually
and on behalf of all others similarly
situated,

Plaintiffs,

- against -

FLAGG BROTHERS, INC., individually
and as representative of a class of
all others similarly situated and
HENRY FLAGG, individually and as
President of Flagg Brothers, Inc.,

Defendants.

- and -

LOUIS J. LEFKOWITZ, as Attorney
General of the State of New York,

Intervenor-Defendant,

- and -

AMERICAN WAREHOUSEMEN'S ASSOCIATION
and INTERNATIONAL ASSOCIATION OF
REFRIGERATED WAREHOUSES, INC., not-
for-profit corporations,

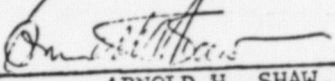
Applicants for Intervention

PLEASE TAKE NOTICE that upon the points and authorities
as set forth in the attached memorandum, the undersigned will
move this Court at a Motion Term held at the United States
Courthouse, Foley Square, Borough of Manhattan, City of New York,
in Room 2904 thereof, on the 1st day of May, 1974 at Ten O'clock
in the forenoon, or as soon thereafter as counsel can be heard,
for an order, pursuant to Rule 24 of the Federal Rules of Civil
Procedure, granting the above named applicant for intervention,
leave to intervene as a party defendant.

NOTICE OF MOTION TO INTERVENE AS DEFENDANTS AND SUPPORTING
AFFIDAVITS OF INTERNATIONAL ASSOCIATION OF REFRIGERATED
WAREHOUSES, INC. AND AMERICAN WAREHOUSEMAN'S ASSOCIATION

complaint herein to the extent that it seeks a declaration of
constitutional invalidity of Sections 7-209 and 7-210 of the
Uniform Commercial Code be dismissed.

JAFFE, SHAW & ROSENBERG,
Attorneys for Warehousemen's
Association of the Port of New
York, Inc. and Cold Storage
Warehousemen's Association of
the Port of New York

By 
ARNOLD H. SHAW, a Partner

Office & P. O. Address
51 Madison Avenue
New York, N. Y. 10010

10. The action is in Telephone No. 212-683-0275

NOTICE OF MOTION TO INTERVENE AS DEFENDANTS AND SUPPORTING
AFFIDAVITS OF INTERNATIONAL ASSOCIATION OF REFRIGERATED
WAREHOUSE, INC. AND AMERICAN WAREHOUSEMAN'S ASSOCIATION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SHIRLEY HERRIOTT BROOKS, individually
and on behalf of all others similarly
situated,

Plaintiffs,

-against-

FLAGG BROTHERS, INC., individually and
as representative of a class of all
others similarly situated, HENRY FLAGG,
individually and as President of Flagg
Brothers, Inc., and JAMES A. LEVISTER,
individually and as City Marshall of
the City of Mount Vernon, New York,

Defendants,

-and-

LOUIS J. FRANKOWITZ, Attorney General,

Intervenor-Defendant.

NOTICE OF MOTION
FOR LEAVE TO
INTERVENE

73 Civ. 4050

S I R S :

PLEASE TAKE NOTICE, that upon the annexed affidavit of
ARNOLD H. SHAW, sworn to April 11, 1974, the undersigned
will make a motion for leave to intervene pursuant to Rule 24
of the Federal Rules of Civil Procedure at Room 2904, the United
States Courthouse, Foley Square, New York, New York 10007 on the
24th day of April, 1974 at 10 o'clock in the forenoon or as
soon thereafter as counsel may be heard for an order allowing the
Warehousemen's Association of the Port of New York, Inc., and the
Cold Storage Warehousemen's Association of the Port of New York

NOTICE OF MOTION TO INTERVENE AS DEFENDANTS AND SUPPORTING
AFFIDAVITS OF INTERNATIONAL ASSOCIATION OF REFRIGERATED
WAREHOUSES, INC. AND AMERICAN WAREHOUSEMAN'S ASSOCIATION

to intervene in defense of the constitutionality of Uniform
Commercial Code Sections 7-209 and 7-210, and for such other and
further relief as the Court may deem just and proper.

Dated: New York, New York
April 11, 1974

Yours, etc.

JAFFE, SHAW & ROSENBERG,
Attorneys for the Warehouse-
men's Association of the
Port of New York, Inc. and
the Cold Storage Warehouse-
men's Association of the Port
of New York
Office & P. O. Address
51 Madison Avenue
New York, N. Y. 10010
Telephone: 212-683-0275

To: The Legal Aid Society of
Westchester County,
Gene F. Reibman, Esq. and Martin
A. Schwartz, Esq. of Counsel
Attorneys for Plaintiffs
56 Grand Street
White Plains, N.Y. 10601

Brodsky, Linett & Altman, Esqs.,
Attorneys for Defendants
1776 Broadway
New York, N.Y. 10019

Hon. Louis J. Lefkowitz,
Attorney General of the State
of New York,
Intervenor-Defendant
2 World Trade Center
New York, N.Y. 10047

NOTICE OF

MOTION TO INTERVENE AS DEFENDANTS AND SUPPORTING AFFIDAVITS
OF INTERNATIONAL ASSOCIATION OF WAREHOUSES, INC. AND
AMERICAN WAREHOUSEMAN'S ASSOCIATION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
:
SHIRLEY HERRIOTT BROOKS, individually
and on behalf of all others similarly
situated, :

Plaintiffs, :

-against- :

FLAGG BROTHERS, INC., individually and :
as representative of a class of all :
others similarly situated, HENRY FLAGG, :
individually and as President of Flagg :
Brothers, Inc., and JAMES A. LEVISTER, :
individually and as City Marshall of :
the City of Mount Vernon, New York, :

Defendants. :

-and- :

LOUIS J. LEFKOWITZ, Attorney General, :

Intervenor-Defendant. :

-----X
STATE OF NEW YORK)
ss.:
COUNTY OF NEW YORK)

ARNOLD H. SHAW, being duly sworn, deposes and says:

I am a member of the firm of Jaffe, Shaw & Rosenberg,
attorneys for the movants hereinafter named and I make this
affidavit in support of their motion to intervene.

The Warehousemen's Association of the Port of New York
(hereinafter referred to as the "Association") is a membership
corporation of the State of New York. The Cold Storage Warehouse-
men's Association of the Port of New York (hereinafter referred
to as the "Cold Storage Association") is an unincorporated

AFFIDAVIT

73 Civ. 4050

NOTICE OF MOTION TO INTERVENE AS DEFENDANTS AND SUPPORTING
AFFIDAVITS OF INTERNATIONAL ASSOCIATION OF REFRIGERATED
WAREHOUSES, INC. AND AMERICAN WAREHOUSEMAN'S ASSOCIATION

association. The Association is a trade association consisting of many public warehousemen doing business in the City of New York and in the metropolitan New Jersey area who are engaged in the commercial warehousing business. These members store, handle and distribute merchandise, commodities and materials of every character and description. The Cold Storage Association is also a trade association. Its members do business in the same vicinity, and their activities consist primarily of the storage, handling and distribution of perishable foods and other commodities that require refrigerated facilities for their storage. Both of the movants store, handle and distribute goods, wares, merchandise, materials and commodities primarily for and on behalf of merchants and other commercial and business entities who are engaged in interstate and international commerce. The movants' members are, accordingly, a vital adjunct to the normal flow and functioning of business and commerce in the metropolitan New York and New Jersey areas. For example, many of the customers (bailors) of the members of both movants are importers who store their goods in United States customs bonded facilities maintained by many of movants' members.

The main thrust of the complaint, is to achieve a judicial declaration of unconstitutionality of two sections of the Uniform Commercial Code, Sections 7-209 and 7-210. Section 7-209 provides for a warehouseman's lien, and Section 7-210 sets forth the method of enforcement of the lien. It goes without saying, therefore, that an adjudication of invalidity on constitutional grounds would have consequences that far transcend

NOTICE OF MOTION TO INTERVENE AS DEFENDANTS AND SUPPORTING
AFFIDAVITS OF INTERNATIONAL ASSOCIATION OF REFRIGERATED
WAREHOUSES, INC. AND AMERICAN WAREHOUSEMAN'S ASSOCIATION

the rights of the plaintiffs and the defendants, and would vitally affect the rights and interests not only of the members of the Association and the Cold Storage Association, but of all public warehousemen doing business in the entire metropolitan area and, indeed, in virtually the entire nation, the Uniform Commercial Code having been adopted by all states, with the exception of Louisiana, and by the District of Columbia and the Virgin Islands. (5 Bender's U.C.C. Service, ¶11.05).

If Sections 7-209 and 7-210 are declared unconstitutional, the consequences to the commercial public warehouse industry would be devastating. From time immemorial, public warehousemen have depended upon the security of the warehousemen's lien in readily taking into their establishments for storage goods of every description from all types of bailors. Without the lien, warehousemen would, of necessity, be required to be selective, and to limit their receipt of goods only to those merchants, entrepreneurs and other persons who either belong to the financially elite, or to those who would be in a position to produce a surety bond or other acceptable guarantee of payment. This would not only ruinously curtail the business of every warehouseman, but it would seriously interfere with and disrupt trade, commerce and industry.

I recognize that the principal defendant herein, Flagg Brothers, Inc. has interposed a defense "individually and as representative of a class of all others similarly situated". It is respectfully submitted, however, that the members of the

NOTICE OF MOTION TO INTERVENE AS DEFENDANTS AND SUPPORTING
AFFIDAVITS OF INTERNATIONAL ASSOCIATION OF REFRIGERATED
WAREHOUSES, INC. AND AMERICAN WAREHOUSEMAN'S ASSOCIATION

Association and the Cold Storage Association are not situated similarly to the defendant, Flagg Brothers, Inc. It is true that Flagg Brothers is a public warehouseman entitled to a warehousemen's lien and the enforcement thereof under the subject U.C.C. sections, but this is where the similarity ends. The defendant, Flagg Brothers, upon information and belief, is engaged in the storage and moving of furniture and household furnishings and as such, it deals primarily with members of the general public.

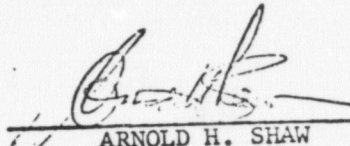
The membership of the Association and the Cold Storage Association, however, as already indicated, differ from the defendant, Flagg Brothers, in that they deal primarily with goods that are in trade, commerce and industry. Therefore, the membership of the Association and the Cold Storage Association is not adequately represented in the within action and yet, these members have a vital stake in the outcome of the litigation insofar as the issue of constitutionality of Sections 7-209 and 7-210 of the Uniform Commercial Code are concerned.

From all of the foregoing, it is clear that the moving parties' defense and the main action have a question of law in common and, accordingly, intervention is appropriate pursuant to Rule 24, FRCP.

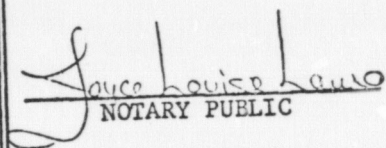
It is the intention of the movants to limit their participation herein to the question of constitutionality. They do not intend to become involved in the other factual issues. The rights of the original parties, therefore, cannot conceivably be delayed or prejudiced.

NOTICE OF MOTION TO INTERVENE AS DEFENDANTS AND SUPPORTING
AFFIDAVITS OF INTERNATIONAL ASSOCIATION OF REFRIGERATED
WAREHOUSES, INC. AND AMERICAN WAREHOUSEMAN'S ASSOCIATION

WHEREFORE, I respectfully request that the motion of
the Warehousemen's Association of the Port of New York, Inc. and
the Cold Storage Warehousemen's Association of the Port of New
York to intervene be granted.


ARNOLD H. SHAW

Sworn to before me this
11th day of April, 1974.


NOTARY PUBLIC

JOYCE LOUISE LAURO
Notary Public, State of New York
No. 24-2271225
Qualified in Kings County
Commission Expires March 30, 1975

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Applicants for Intervention

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MOTION FOR LEAVE TO INTERVENE AS DEFENDANTS AND SUPPORTING AFFIDAVITS
OF AMERICAN WAREHOUSEMAN'S ASSOCIATION AND REFRIGERATED WAREHOUSES, INC.
II.

American Warehousemen's Association is a Not-For-Profit Corporation organized and existing under the laws of the State of Illinois, with principal offices at Chicago, Illinois. It is the national trade association for the public merchandise warehousing industry, having 478 members who operate warehouses in all states, except Hawaii, Mississippi, South Dakota and West Virginia. The member warehouses account for approximately 1,801,218,000 cubic feet of warehouse space which represents about 75% of all public merchandise warehouse space in the United States. The member warehouses provide warehouse and distribution services to business and industry.

III.

International Association of Refrigerated Warehouses, Inc., is a Not-For-Profit Corporation organized and existing under the laws of the State of Delaware, with principal offices at Washington, D.C. It is the national trade association for the public refrigerated warehousing industry, having 218 member companies in the United States who operate 432 public refrigerated warehouses in all states, except Alaska, Montana, New Hampshire and Wyoming. The member warehouses account for about 567,000,000 cubic feet of public refrigerated warehouse space which comprises over 75% of the total public refrigerated warehouse space in the United States. The member warehouses provide warehouse and distribution services for manufacturers, processors and distributors of food products and other goods requiring refrigeration.

IV.

The Uniform Commercial Code has been adopted in 49 states and the District of Columbia, including the State of New York. The provisions of §§7-209 and 7-210 respecting the creation and enforcement of the warehouseman's lien apply to the warehousing business of the applicant's members in New York as well as the other

MOTION FOR LEAVE TO INTERVENE AS DEFENDANTS AND SUPPORTING AFFIDAVITS
OF AMERICAN WAREHOUSEMAN'S ASSOCIATION & REFRIGERATED WAREHOUSES, INC.

states which have adopted the Uniform Commercial Code. The constitutionality of the lien provisions which govern innumerable warehousing transactions is a subject in which the applicants have a vital and substantial interest. If the warehouseman's lien provisions of the UCC are held to be unconstitutional the adverse effect upon applicants' members would be substantial. Their interest in upholding the constitutionality of the involved provisions requires that they be permitted to assert their defenses to the instant action. Since their interests as public warehouses for commercial and industrial accounts may differ from the interests of the warehousemen of household goods the applicants' interests are not adequately represented by existing parties.

V.

The applicants' defenses to the claimed unconstitutionality of the warehouseman's lien provisions of the Uniform Commercial Code present questions of law and fact which are common to the main action. Applicants have a substantial interest in the resolution of these questions since a determination of unconstitutionality would cause substantial disruption to existing and long standing commercial relationships and practices. The intervention of applicants would not unduly broaden the issues involved in this proceeding or delay or prejudice the adjudication of the rights of the original parties.

WHEREFORE, the American Warehousemen's Association and the International Association of Refrigerated Warehouses, Inc., request that their motion for leave to intervene in this action as party defendants be granted and that leave be granted to file the

MOTION FOR LEAVE TO INTERVENE AS DEFENDANTS AND SUPPORTING AFFIDAVITS
OF AMERICAN WAREHOUSEMAN'S ASSOCIATION & REFRIGERATED WAREHOUSES, INC.

attached Answer instant.

Respectfully submitted,

AMERICAN WAREHOUSEMEN'S ASSOCIATION
and INTERNATIONAL ASSOCIATION OF
REFRIGERATED WAREHOUSES, INC.

By William H. Towle
WILLIAM H. TOWLE
HARDMAN, BURKE, KERWIN & TOWLE
Their Attorneys
127 North Dearborn Street
Chicago, Illinois 60602
(312) 332-5106

and

By /S/
MARTIN WERNER
WERNER & WEISS
Their Attorneys
2 West 45th Street
New York, New York 10036
(212) 697-6969

DATED: April 17, 1974

MOTION FOR LEAVE TO INTERVENE AS DEFENDANTS & SUPPORTING AFFIDAVITS
OF AMERICAN WAREHOUSEMAN'S ASSOCIATION & REFRIGERATED WAREHOUSES, INC.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x
SHIRLEY HERRIOTT BROOKS, individually
and on behalf of all others similarly
situated,

Plaintiffs,

- against -

FLAGG BROTHERS, INC., individually
and as representative of a class of
all others similarly situated and
HENRY FLAGG, individually and as
President of Flagg Brothers, Inc.,

Defendants,

- and -

LOUIS J. LEFKOWITZ, as Attorney
General of the State of New York,

Intervenor-Defendant,

- and -

AMERICAN WAREHOUSEMEN'S ASSOCIATION
and INTERNATIONAL ASSOCIATION OF
REFRIGERATED WAREHOUSES, INC., not-
for-profit corporations,

Applicants for Intervention
----- x

:
: Civil Action
: File No.
: 73 CIV 4050

:
: AFFIDAVIT IN
: SUPPORT OF
: CO-COUNSEL
: ASSOCIATION

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

MARTIN WERNER, being duly sworn, deposes and says that
he is an attorney at law duly admitted to practice in the State
of New York, and is a member of the Bar of the United States
District Court for the Southern District of New York.

This affidavit is respectfully submitted in support of
the motion for permission for WILLIAM H. TOWLE to be associated
as co-counsel with your deponent's firm in the instant matter.

MOTION FOR LEAVE TO INTERVENE AS DEFENDANTS & SUPPORTING AFFIDAVITS

OF AMERICAN WAREHOUSEMAN'S ASSOCIATION & REFRIGERATED WAREHOUSES, INC.

WILLIAM H. TOWLE is an attorney at law and a member of the Bar of the State of Illinois since 1959 and a member of the Bar of the United States District Court for the Northern District of Illinois since 1966. He is a member of the law firm of HARDMAN, BURKE, KERWIN & TOWLE of 127 North Dearborn Street, Chicago, Illinois, which is regular counsel for the American Warehousemen's Association and the International Association of Refrigerated Warehouses, Inc., applicant for intervention in this proceeding.

WHEREFORE, it is respectfully prayed that the said WILLIAM H. TOWLE be permitted to be associated as co-counsel with your deponent in this proceeding.

15/

MARTIN WERNER

Sworn to before me this 17th day
of April, 1974.

15/

Notary Public

NORMAN WEISS
Notary Public, State of New York
No. 31-4208490
Qualified in New York County
Commission Expires March 30, 1974

PLAINTIFF'S AFFIDAVITS IN OPPOSITION TO DEFENDANTS' MOTIONS
TO INTERVENE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
SHIRLEY HERRIOTT BROOKS, individually
and on behalf of all others similarly
situated,

Plaintiffs,

--against--

AFFIDAVITS IN
OPPOSITION TO
MOTIONS TO
INTERVENE

FLAGG BROTHERS, INC., individually
and as representative of a class of
all others similarly situated, and
HENRY FLAGG, individually and as
President of Flagg Brothers, Inc.,

Defendants.

-----X
STATE OF NEW YORK)
) SS.:
COUNTY OF WESTCHESTER)

GENE F. REIBMAN, being duly sworn, deposes and says:

1. I am of counsel to the Legal Aid Society of Westchester County, the attorney for plaintiff Brooks and proposed plaintiff-intervenor Jones. I make this affidavit in opposition to the applications of The American Warehousemen's Association; the International Association of Refrigerated Warehouses, Inc.; the Warehousemen's Association of the Port of New York, Inc.; and, the Cold Storage Warehousemen's Association of the Port of New York to intervene in this action as parties-defendant.

2. It is apparent from a reading of the affidavits in support of the motions to intervene that said proposed intervenor-defendants have no "interest relating to the property or transaction which is the subject of [this] action" within the meaning of F.R. Civ. P. Rule 24 (a) (2), nor, do they assert a "claim or defense" within the meaning of rule 24 (b) (2).

PLAINTIFF'S AFFIDAVITS 'IN OPPOSITION TO DEFENDANTS'
MOTIONS TO INTERVENE

3. Plaintiff has no objection to the proposed intervenors-defendants participating in this action as amicus curiae.

WHEREFORE, your affiant respectfully prays that the motions of The American Warehousemen's Association; the International Association of Refrigerated Warehouses, Inc.; the Warehousemen's Association of the Port of New York, Inc.; and, the Cold Storage Warehousemen's Association of the Port of New York to intervene in this action as parties-defendant be denied.

Sworn to before me, this
30th day of April 1974.

MARTIN A. SCHWARTZ
Notary Public, State of New York
No. 0335275
Qualified in Westchester County
Commission Expires March 1975

S/
GENE F. REIBMAN

Yours, etc.

GENE F. REIBMAN, MARTIN A.
SCHWARTZ & LAWRENCE KAHN,
of counsel
The Legal Aid Society of
Westchester County
Attorneys for Plaintiff
Office & P.O. Address
56 Grand Street
White Plains, New York 10601
(914) 761 - 9200

TO:

Brodsky, Linett & Altman
1776 Broadway
New York, New York 10019
(212) 245-7700
Attorneys for Flagg Brothers and
Defendant Flagg

Hon. Louis J. Lefkowitz
Attorney General of the State of New York
Two World Trade Center
New York, New York 10007
Intervenor-Defendant

PLAINTIFF'S AFFIDAVITS IN OPPOSITION TO DEFENDANTS' MOTIONS
TO INTERVENE

Werner & Weiss
2 West 45th Street
New York, New York 10036
(212) 697 - 6969
American Warehousemen's Association
and International Association of
Refrigerated Warehouses, Inc.

Jaffe, Shaw & Rosenberg
51 Madison Avenue
New York, New York 10010
(212) 683 - 0275
Warehousemen's Association of
the Port of New York, Inc. and
the Cold Storage Warehousemen's
Association of the Port of New York

Subscribed and sworn to before me, this
day of 1974.

(SIGNED) F. PETERSON

Yours, etc.

The undersigned, Clerk of the
Court, do hereby certify that
the foregoing is a true and
correct copy of the original
filed in my office.

(SIGNED) F. PETERSON

1111 Broadway
New York, New York 10010
(212) 697-6969
Attorneys for the Plaintiff and
Defendant.

Notary Public for the State of New York
My Commission Expires 12/31/75
My Office is at 1111 Broadway, New York, N.Y. 10010

NOTICE OF MOTION TO INTERVENE AS PLAINTIFF AND SUPPORTING
AFFIDAVIT OF GLORIA JONES

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SHIRLEY HERRIOTT BROOKS, individually
and on behalf of all others similarly
situated,

Plaintiff,

-against-

FLAGG BROTHERS, INC., individually and
as representative of a class of all
others similarly situated,

HENRY FLAGG, individually and as
President of Flagg Brothers, Inc.,

Defendants,

-and-

NEW YORK STATE MOVERS & WAREHOUSEMAN'S
ASSOCIATES, INC.,

Intervenor-Defendants.

TO THE DEFENDANTS:

PLEASE TAKE NOTICE that GLORIA JONES
will bring on for hearing before the United States District
Court in Room 7 of the United States Courthouse, Foley Square,
New York, New York, on the 29th day of April, 1974, at
or as soon thereafter as counsel may be heard, a motion for an
order permitting Gloria Jones to intervene in this action,
individually and on behalf of all others similarly situated,
pursuant to Rule 24(b)(2) of the Federal Rules of Civil Procedure
as party plaintiff.

The grounds of this motion, as are more fully set forth
in the proposed intervenor-plaintiff's complaint, are that the
proposed intervenor is a member of the class purported to be
represented by the named plaintiff and that the proposed inter-
venor's claims and the claims of the named plaintiff contain
identical questions of law, i.e., the constitutionality and valid-

NOTICE OF MOTION
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NOTICE OF MOTION TO INTERVENE AS PLAINTIFF AND SUPPORTING
AFFIDAVIT OF GLORIA JONES

ity of New York Uniform Commercial Code, §§7-209 and 7-210.
Permitting the applicant to intervene will not unduly delay or
prejudice the adjudication of the rights of the original parties.

PLEASE TAKE FURTHER NOTICE that
opposing affidavits and answering memoranda must be served upon
counsel for plaintiffs at least three days before the return
day of this motion.

Dated: April 11th, 1974.
White Plains, N.Y.

15/
THE LEGAL AID SOCIETY OF
WESTCHESTER COUNTY

BY:

LAWRENCE S. KAHN, Of Counsel
MARTIN A. SCHWARTZ, Of Counsel
GENE B. REIBMAN, Of Counsel
Attorneys for Plaintiffs
Office & P.O. Address
56 Grand Street
White Plains, New York 10601
761-9200

NOTICE OF MOTION TO INTERVENE AS PLAINTIFF AND SUPPORTING
AFFIDAVIT OF GLORIA JONES

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

GLORIA JONES, individually and on :
behalf of all others similarly :
situated, :

Plaintiff, :

-against- :

FLAGG BROTHERS, INC., individually :
and as representative of a class :
of all others similarly situated, :
and :

HENRY FLAGG, individually and as :
President of Flagg Brothers, Inc., :

Defendants. :

PROPOSED
INTERVENOR'S
COMPLAINT

73 Civ. 4050
M.I.G.

I.
PRELIMINARY STATEMENT

1. This is a class action for injunctive and declaratory relief and damages brought pursuant to 42 U.S.C. §1983. Plaintiffs challenge the constitutionality of New York Uniform Commercial Code, §§7-209 and 7-210 on the grounds that these statutes violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution in that they grant a warehouseman a lien and the right to sell stored goods for warehouseman's fees allegedly due without granting the owner of the stored goods an opportunity for a hearing prior to the imposition of the lien and sale.

II.
JURISDICTION

2. Jurisdiction is conferred on this Court by 28 U.S.C. §1343(3) which provides for the original jurisdiction of this Court in suits brought under color of any State statute, ordinance, regulation, custom or usage to redress rights, privi-

NOTICE OF MOTION TO INTERVENE AS PLAINTIFF AND SUPPORTING
AFFIDAVIT OF GLORIA JONES

leges and immunities secured by the United States Constitution without regard to the amount in controversy.

3. Plaintiffs' request for injunctive relief and damages is authorized by 42 U.S.C. §1983. Plaintiffs' request for a declaratory judgment is authorized by 28 U.S.C. §§2201 and 2202.

III.
CLASS ACTION ALLEGATIONS

A. Plaintiff Class

4. Plaintiffs are members of a class of persons whose property is stored in a warehouse located in the State of New York and whose property has been encumbered by a lien pursuant to New York Uniform Commercial Code §7-209 and subject to sale pursuant to New York Uniform Commercial Code §7-210 because of warehouse fees allegedly due, without opportunity for a prior hearing.

5. This class action is properly brought pursuant to Rule 23 of the Federal Rules of Civil Procedure because: (a) the class is so numerous that joinder of all members is impracticable. There are numerous persons whose property is stored in a warehouse in the State of New York whose property has been encumbered by a lien and subject to sale without a prior opportunity to be heard; (b) there are questions of law and fact common to the class, namely, the constitutional validity of New York Uniform Commercial Code, §§7-209 and 7-210; (c) the claims of the representative plaintiffs are typical of the claims of the members of the class and it can reasonably be expected that defendants will interpose identical defenses to such claims; (d) the Legal Aid Society of Westchester County, attorney for plaintiffs, will fairly and adequately protect the interests of the class; and (e) defendants, in failing to provide plaintiffs with an opportunity to be heard, have acted and refused to act on grounds generally applicable to the class.

NOTICE OF MOTION TO INTERVENE AS PLAINTIFF AND SUPPORTING
AFFIDAVIT OF GLORIA JONES

B. Defendant Class

6. Defendant Flagg Brothers is a representative of a class of defendants, all of whom are warehousemen doing business in the State of New York and who impose liens and subject goods to sale pursuant to New York Uniform Commercial Code §§209-210 without affording the owner of the goods a prior opportunity to be heard.

7. This class is so numerous that joinder of all members is impracticable. The issue of law presented by this action is common to all members of the defendant class and the defendant has acted and refused to act on grounds generally applicable to the class. In addition, the prosecution of separate actions against individual members of the defendant class could create a risk of inconsistent adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the members of the defendant class; adjudications with respect to the individual members of the defendant class as a practical matter would be dispositive of the interests of the other members of the defendant class; the questions of law and fact common to the members of the class predominate over any questions affecting individual members, and a class action is superior to other available methods for the fair and different adjudication of the controversy.

IV.
PARTIES

8. Plaintiff GLORIA JONES is a citizen of the United States and of the State of New York. Plaintiff resides alone at 670 East Lincoln Avenue, Mount Vernon, New York. Plaintiff is employed by the Burlington Fabrics Company, Mount Vernon, New York, for which her take home pay is approximately \$87.00 per week. This is the sole source of plaintiff's income.

NOTICE OF MOTION TO INTERVENE AS PLAINTIFF AND SUPPORTING
AFFIDAVIT OF GLORIA JONES

9. Defendant Flagg Brothers, Inc., is a corporation organized under the laws of the State of New York and is engaged in the business of moving and storage in the State of New York. Defendant maintains an office and is engaged in business at 247 South Fifth Avenue, Mount Vernon, New York.

10. Defendant Harry Flagg is President of defendant Flagg Brothers, Inc. He is being sued individually and in his official capacity.

V.
FACTUAL ALLEGATIONS

11. In the fall of 1973, plaintiff and her family were residing at 353 Mundy Lane, Mount Vernon, New York. Pursuant to a judgment of eviction that had been entered against plaintiff by the City Court of Mount Vernon, and a warrant of eviction that had been issued by said court, James A. Levister, City Marshall of the City of Mount Vernon, appeared on November 26, 1973, to remove plaintiff and her possessions from her apartment.

12. When City Marshall James A. Levister appeared on November 26, 1973, to remove plaintiff and her possessions from her apartment, plaintiff unsuccessfully attempted to contact a caseworker at the Westchester County Department of Social Services to obtain advice as to whom she should call to store her furniture and other household possessions. Marshall Levister then informed plaintiff that she could not get anyone to store her furniture and other possessions and that the man with him, an employee of defendant Flagg Brothers, Inc., was the man who would store her goods.

13. Plaintiff did not on November 26, 1973, and has never since authorized defendant Flagg Brothers, Inc., to store her furniture and household possessions, either by written or oral contract, or otherwise.

NOTICE OF MOTION TO INTERVENE AS PLAINTIFF AND SUPPORTING
AFFIDAVIT OF GLORIA JONES

14. Plaintiff was never advised of the rate that she would have to pay for the storage of her household goods.

15. After plaintiff was evicted, she moved into an apartment at 670 East Lincoln Avenue, Mount Vernon, New York.

16. In March of 1974, plaintiff contacted defendant Flagg Brothers and was informed that plaintiff would have to pay Flagg Brothers the sum of Six Hundred Dollars in order to acquire her household goods. Plaintiff was informed that if she had not contacted Flagg Brothers at that time, the goods would have been sold immediately thereafter. Plaintiff had never previously been notified that such a sale would take place.

17. Subsequently, plaintiff complained to defendants that the price they had charged her was unreasonable, and that she had not contracted to pay defendants any sum for storage of her household goods. Thereupon, defendants notified plaintiff that her bill was actually only Five Hundred Dollars, and that if she arranged to move her goods from defendants' warehouse by her own means the bill would be further reduced to Three Hundred Thirty-five Dollars (see Exhibit "A", annexed hereto). Plaintiff was informed that if she was unable to pay the entire bill by approximately April 12, 1974, her stored goods would be sold. Plaintiff believes that she does not owe defendants the amount they are charging her, but in any event plaintiff cannot afford to pay defendants this amount.

18. All of plaintiff's furniture and household goods are presently in defendant Flagg Brothers warehouse. Defendants continued detention of plaintiff's goods, all of which are essential items of household furniture, and the imposition of the statutory lien pursuant to New York Uniform Commercial Code §7-209 have resulted in plaintiff and her family having to reside without these items, thereby causing plaintiff and her family grave and irreparable harm. A list of these goods are annexed hereto as Exhibit "B". Defendants have threatened to

NOTICE OF MOTION TO INTERVENE AS PLAINTIFF AND SUPPORTING
AFFIDAVIT OF GLORIA JONES

sell these goods pursuant to New York Uniform Commercial Code §7-210 without affording plaintiff an opportunity to be heard. The sale of these goods without a prior hearing will cause plaintiff and her family further grave and irreparable injury in that the goods being held by defendant Flagg Brothers constitute essential items of household furniture which plaintiff, because of her limited income of approximately \$87.00 per week, cannot afford to replace.

19. The imposition of a warehouseman's lien pursuant to New York Uniform Commercial Code §7-209 and the threatened sale of the goods pursuant to New York Uniform Commercial Code §7-210 are actions under color of state law in that they are actions fostered and authorized by New York State statutes and are activities traditionally carried out by public officials and thus constitute public functions.

VI.
LEGAL CLAIMS

20. Defendants' imposition of a lien on plaintiff's goods pursuant to New York Uniform Commercial Code §7-209 and threatened sale of plaintiff's goods pursuant to New York Uniform Commercial Code §7-210 without affording plaintiff an opportunity for a prior hearing violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

21. New York Uniform Commercial Code §§7-209 and 7-210 violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution in that they authorize the encumbrance of a lien and the sale of goods stored in a warehouse for warehouse charges allegedly due without affording the owner of the goods an opportunity to be heard.

22. New York Uniform Commercial Code §§7-209 and 7-210 violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution in that these statutes have the effect

NOTICE OF MOTION TO INTERVENE AS PLAINTIFF AND SUPPORTING
AFFIDAVIT OF GLORIA JONES

irrationally and arbitrarily discriminating against persons of low income. Persons with means can pay the amount of alleged debts for warehouse moving and storage and contest the legality of the debt in a subsequent legal proceeding, thereby obtaining their goods. Low income persons such as plaintiff do not have this option and cannot prevent the imposition of the statutory lien and sale without an opportunity to be heard.

WHEREFORE, plaintiff respectfully prays on behalf of herself and all others similarly situated that this Court:

1. Assume jurisdiction of this action and issue a preliminary and permanent injunction:

(a) Enjoining defendants, their officers, employees, agents and successors from encumbering plaintiff's goods and selling these goods without affording plaintiff an opportunity to be heard;

(b) Enjoining defendants, their officers, employees, agents and successors from enforcing New York Commercial Code §§7-209 and 210 without affording plaintiff an opportunity for a hearing prior to the imposition of a lien or the sale of goods placed by an owner in a warehouse.

(c) Mandate defendants, their officers, employees agents and successors to provide plaintiffs with an opportunity for a hearing prior to the imposition of a lien and sale of goods placed by an owner in a warehouse.

2. Enter a final judgment declaring defendants' imposition of a lien and threatened sale of plaintiffs' goods and New York Uniform Commercial Code §§7-209 & 7-210 unconstitutional in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution.

NOTICE OF MOTION TO INTERVENE AS PLAINTIFF AND SUPPORTING
AFFIDAVIT OF GLORIA JONES

3. Enter a final judgment awarding plaintiff \$3,000 actual and nominal damages against the defendants jointly and severally.

4. Determine this to be a valid class action pursuant to Rule 23 of the Federal Rules of Civil Procedure.

5. Award plaintiffs their costs, disbursements and attorneys' fees.

6. Award plaintiffs such other, further and alternative relief as to this Court may be just and proper.

Dated: April 11th, 1974
White Plains, New York

15
THE LEGAL AID SOCIETY OF
WESTCHESTER COUNTY

BY:

LAWRENCE S. KAHN, Of Counsel
MARTIN A. SCHWARTZ, Of Counsel
GENE B. REIBMAN, Of Counsel
Attorneys for Plaintiff
Office & P.O. Address
56 Grand Street
White Plains, New York 10601
Telephone: (914) 761-9200

NOTICE OF MOTION TO INTERVENE AS PLAINTIFF AND SUPPORTING
AFFIDAVIT OF GLORIA JONES

If she p/u changes:

ARE:

75.00	—	platform chg
35.00	—	Legal fees
225.00	—	Steno. D.
<u>\$ 335.00</u>		

If Flag Rns. Moves you

Dated:

165.00	—	moving out
35.00	—	Legal fees
75.00	—	platform
325.00	—	Steno. D.
<u>\$ 500.00</u>		

NOTICE OF MOTION TO INTERVENE AS PLAINTIFF AND
SUPPORTING AFFIDAVIT OF GLORIA JONES

1. 2 Full size beds
 2. 2 long dressers
 3. Dining room table
and 6 chairs
 4. Hutch
 5. 3 piece Wicker Chair set
 6. 2 mirrors
 7. 2 end tables
 8. Gas stove
 9. Refrigerator
 10. Cabinet for dishes
 11. Clothes
 12. Lamps
 13. Carpet
- Other goods

Exhibit "B"

DEFENDANT'S ANSWERING AFFIDAVIT IN OPPOSITION TO PLAINTIFF'S
MOTION TO INTERVENE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SHIRLEY HERRIOTT BROOKS, et al.,

73 Civ. 4050

Plaintiffs,

- against -

FLAGG BROTHERS, INC., et al.,

ANSWERING AFFIDAVIT
IN OPPOSITION TO
MOTION TO INTERVENE

Defendants.

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

ALVIN ALTMAN, being duly sworn, deposes and says:

1. I am associated with Brodsky, Linett and Altman, attorneys for defendants and have knowledge of the facts recited herein from my investigation of the case and conversations with defendant, HENRY FLAGG, president of the corporate defendant.

2. This affidavit is submitted in opposition to the motion of GLORIA JONES, for leave to intervene in the above action upon the grounds that the proposed intervenor, GLORIA JONES, (1) is not a proper party to represent the plaintiffs in this action, and (2) she has no justiciable claim against the defendants in common with the claims presented in the main action. It is further respectfully submitted that intervention would unduly delay and prejudice the rights of the original parties.

3. Both the main action and the intervenor's lawsuit challenge the constitutionality of N.Y. U.C.C. Sections 7-209 and 7-210, the warehousemen's lien laws of New York State under the U. S. Constitution. The

DEFENDANT'S ANSWERING AFFIDAVIT IN OPPOSITION TO PLAINTIFF'S
MOTION TO INTERVENE

Court cannot hear the proposed intervenor's lawsuit and this lawsuit cannot be maintained as a class action if the provisions of Section 7-209 and 7-210, particularly the latter statute, were not followed in the proposed intervenor's case.

4. As alleged in the proposed complaint, defendants removed Mrs. JONES' belongings from the sidewalk in front of her apartment building at 353 Mundy Lane, Mount Vernon, New York, to storage in November, 1973, following her eviction from the apartment by a City Marshal. This was done with the knowledge, consent and approval of both Mrs. JONES and the Department of Social Services of Westchester County. The said Department paid defendants transportation charges for the removal and for one month's storage. A copy of a letter dated December 13, 1973 from the Department to defendants is annexed. After one month of storage, Mrs. JONES was personally responsible for the storage charges in an amount which she knew and which she refused to pay after due demand. Although defendant advised Mrs. JONES that her belongings could be sold for delinquency in payment, defendant did not at any time initiate the procedure required under Section 7-210 before a sale is authorized.

5. In point of fact, Mr. KAHN, attorney for the proposed intervenor has spoken with your deponent and I have advised him defendants have no intention of selling the goods and if defendants do so decide, I will inform him well in advance of any sale.

6. In the main action Mrs. BROOKS' goods have been returned to her in their entirety and the dispute

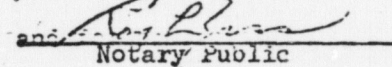
DEFENDANT'S ANSWERING AFFIDAVIT IN OPPOSITION TO PLAINTIFF'S
MOTION TO INTERVENE

to that extent has been settled. The only questions
remaining therein are a claim for damages in the amount
of \$500.00 for alleged wrongful detention of her belong-
ings and the question of constitutionality of the
challenged sections of the Uniform Commercial Code.

WHEREFORE, for the reasons stated in the accom-
panying memorandum of law defendants respectfully
submit that the motion for intervention should be
denied.


ALVIN ALTMAN

Sworn to before me this
25th day of April, 1974
paid defendant's fees

and 
Notary Public

December 11, 1973
ROY L. ZISSER
Notary Public, State of New York
ann. No. 44-439-455
Qualified in Richmond County
Commission Expires 12/31/75

DEFENDANT'S ANSWERING AFFIDAVIT IN OPPOSITION TO PLAINTIFF'S
MOTION TO INTERVENE

Edwin G. Michelson
COUNTY CLERK



Leonard Berman
COMMISSIONER

John J. Allen
SISTERS

County of Westchester

DEPARTMENT OF SOCIAL SERVICES

DIVISION OF FAMILY AND CHILD SOCIAL SERVICES

Flagg Brothers Moving & Storage
41 East 3rd Street
Mount Vernon, N.Y.

December 13, 1973

RE: Gloria Jones
353 Mundy Lane
Mount Vernon, N.Y.

1. 10 Mitchell Place
White Plains, N. Y. 10601
Tel: 949-1300

2. Grantlands Hospital - M. A. Office
Valhalla, N. Y. 10595
Tel: 532 8500, Ext. 2739

3. 25 Bradhurst Avenue
Mount Vernon, N. Y. 10532
Tel: 592 8500, Ext. 2272

4. 9 South First Avenue
Mt. Vernon, N. Y. 10550
Tel: 661-4224

5. 25 Moore Avenue
Mt. Kisco, N. Y. 10549
Tel: 666-7511

6. 524 North Avenue
New Rochelle, N. Y. 10801
Tel: 636 0600

7. 301 North Highland Avenue
Ossining, N. Y. 10562
Tel: 762 3324

8. 750 Washington Avenue
Port Jervis, N. Y. 10566
Tel: 732 6500

9. 111 South Ridge Street
Port Jervis, N. Y. 10573
Tel: 837-1100

10. Laramie Bldg.
Tarrytown, N. Y. 10591
Tel: 631-7331

11. 81 Court Street
White Plains, N. Y. 10601
Tel: 428 9700

12. 77 Amsterdam Avenue
Yonkers, N. Y. 10701
Tel: 943-7450

13. 875 South Broadway
Yonkers, N. Y. 10701
Tel: 943-7450

14. 88 Washington Avenue
Yonkers, N. Y. 10701
Tel: 943-7450

Dear Sirs:

Please be advised that we are only authorizing payment for one month's storage of client's furniture (11/26/73 thru 12/25/73). We will not be held responsible for any costs incurred if furniture is left in storage beyond this period.

Yours truly,
DIVISION OF FAMILY AND CHILD SOCIAL SERVICES

G. Cookman
(Mrs.) C. Cookman
Employment Worker

Send Replies to: Division of Family and Child Social Services
Use Address Pls.

EXHIBIT A

PLAINTIFF'S REPLY AFFIDAVIT IN SUPPORT OF MOTION TO INTERVENE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SHIRLEY HERRIOTT BROOKS, et al., :
Plaintiffs, : REPLY AFFIDAVIT IN
-against- : SUPPORT OF MOTION
FLAGG BROTHERS, INC., et al., : TO INTERVENE
Defendants. : 73 Civ. 4050 MIG

STATE OF NEW YORK)
COUNTY OF WESTCHESTER)SS:

LAWRENCE S. KAHN, being duly sworn, deposes
and says:

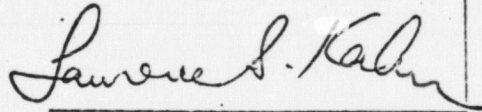
FIRST: I am an attorney on the staff of The Legal Aid
Society of Westchester County and as such am fully familiar
with the facts relating to the instant motion by Gloria Jones
to intervene as a party plaintiff.

SECOND: Upon information and belief, on April 10, 1974,
Gene B. Reibman, another staff attorney associated with The
Legal Aid Society of Westchester County, telephoned Mr. Altman,
an attorney associated with the firm of Brodsky, Linett & Altman,
attorneys for defendant herein, and advised him that The Legal
Aid Society intended to move forthwith to intervene Gloria Jones
as a party plaintiff. Mr. Reibman sought assurance from Mr.
Altman that, pending a determination of Mrs. Jones' motion, her
household goods would not be sold by the defendant. Mr. Altman
responded that he would contact defendant Flagg Brothers to see
if the latter would be willing to make such an assurance and that
he would call Mr. Reibman back to inform him of the result of that
conversation.

• PLAINTIFF'S REPLY AFFIDAVIT IN SUPPORT OF MOTION TO INTERVENE

THIRD: Based upon that conversation, and based upon the fact that in the main action herein Mr. Altman had months earlier assured Mr. Reibman that the goods of the named plaintiff Brooks would not be sold pending the outcome of the action and had, in fact, subsequently arranged for the return of Ms. Brooks' goods, I assumed that, at least until Mr. Altman returned Mr. Reibman's telephone call, Mrs. Jones' goods would not be sold. It was this assumption which convinced me that there was no need to seek a temporary restraining order to prevent the sale of Mrs. Jones' household possessions.

FOURTH: On or about April 22, 1974, following the service and filing of the instant application, I telephoned Mr. Altman to inquire whether he would be able to provide assurance to me that Mrs. Jones' goods would not be sold. At that time he stated that he was able to give me such assurance and that Mrs. Jones' goods would not for the present be sold. Therefore, the fact that I did not seek a temporary restraining order on behalf of the proposed intervenor should not prejudice Mrs. Jones' motion to intervene as a party plaintiff.


LAWRENCE S. KAHN

Sworn to before me this
1st day of May, 1974.


Notary public

GERALD A. NORLANDER
NOTARY PUBLIC, State of New York
No. 4523459
Qualified in New York County
Commission Expires March 20, 1975

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- X

SHIRLEY HERRIOTT BROOKS,
individually and on behalf of all
others similarly situated,

Plaintiffs,

-against-

73 Civ. 4050 MIG

FLAGG BROTHERS, INC., HENRY FLAGG,
individually and as President of
Flagg Brothers, Inc.,

Defendants.

----- X

APPEARANCES

THE LEGAL AID SOCIETY OF WESTCHESTER COUNTY
White Plains, New York

Attorneys for Plaintiffs

By: MARTIN A. SCHWARTZ, LAWRENCE S. KAHN and
GENE F. REIBMAN, of Counsel

LOUIS B. YORK, Esq.,
Manhattan Legal Services Corporation.
New York, N.Y.

Co-Counsel for Plaintiffs

BRODSKY, LINETT & ALTMAN
New York, New York

Attorneys for Defendants

By: ALVIN ALTMAN and MICHAEL J. BARNAS, of Counsel

LOUIS J. LEFKOWITZ, Attorney General of the
State of New York, Pro Se, Proposed Intervenor

By: A. SETH GREENWALD, Assistant Attorney General
of Counsel

WERNER & WEISS

New York, N.Y.

Attorneys for Proposed Intervenors,
American Warehousemen's Association and
International Association of Refrigerated
Warehouses, Inc.

By: MARTIN WEISS, of Counsel

JAFFE, SHAW & ROSENBERG

New York, N.Y.

Attorneys for Proposed Intervenors,
Warehousemen's Association of the Port of N.Y.
and the Cold Storage Warehousemen's Association
of the Port of N.Y.

by: ARNOLD H. SHAW, of Counsel

GURFEIN, D.J.:

This is an action challenging the constitution-
ality of New York's warehousemen's lien laws, N.Y.U.C.C.
§§ 7-209, 7-210, which grant a warehouseman a lien and
the right to sell stored goods for warehouseman's fees
allegedly due without granting the owner of the stored
goods an opportunity for a hearing prior to the imposition
of the lien and sale. The plaintiff Brooks individually
and on behalf of all others similarly situated seeks
declaratory and injunctive relief and money damages.
Jurisdiction is alleged under 42 U.S.C. §§ 1983, 1985,
28 U.S.C. § 1343(3)(4) and 28 U.S.C. §§ 2201, 2202.

There are currently four pending motions to intervene pursuant to Fed. R. Civ. P. 24. (1) Gloria Jones has moved to intervene as a plaintiff individually and on behalf of all others similarly situated pursuant to Fed. R. Civ. P. 24(b)(2); (2) the American Warehousemen's Ass'n and the International Association of Refrigerated Warehouses, Inc. have moved to intervene as party defendants; (3) the Warehousemen's Association of the Port of New York, Inc. and the Cold Storage Warehousemen's Association of the Port of New York have moved to intervene as party defendants; and (4) the Attorney General of the State of New York has moved to intervene as a party defendant. Only the Attorney General's motion is unopposed. Flagg opposes the intervention of the proposed plaintiff.

I

THE 'BROOKS COMPLAINT'

Shirley Brooks ("Brooks") alleges that she represents "a class of persons whose property is stored in a warehouse located in the State of New York and whose property has been encumbered by a lien pursuant to New York

OPINION GRANTING PARTIES' MOTIONS TO INTERVENE

Uniform Commercial Code § 7-209 and subject to sale pursuant to New York Uniform Commercial Code § 7-210 because of warehouse fees allegedly due, without opportunity for a prior hearing.^{1/}"

She further alleges that the action is properly a class action under Fed. R. Civ. P. 23.

Brooks also claims that defendant Flagg Brothers, Inc. ("Flagg Brothers") is a representative of a class of defendants, all of whom are warehousemen doing business in the State of New York and who impose liens and subject goods to sale pursuant to New York Uniform Commercial Code §§ 209-210 without affording the owner of the goods a prior opportunity to be heard."^{2/}

Brooks is a New York citizen, residing in White Plains with her three minor children. Her husband is deceased. Her weekly "take home" salary is approximately \$100, her sole source of income.

1/ ¶ 5

2/ ¶ 7

Flagg Brothers is a New York corporation engaged in the business of moving and storage. Flagg Brothers maintains an office at 247 South Fifth Avenue, Mount Vernon, New York. Defendant Henry Flagg ("Flagg") is President of Flagg Brothers; he is sued individually and in his official capacity. Defendant James A. Leviston ("Marshal") is the City Marshal of Mount Vernon and is also sued individually and in his official capacity.

In her complaint, Brooks alleges the following facts. In the spring of 1973, an order of eviction was entered by the City Court of Mount Vernon against the plaintiff who was then residing at 33 North 3rd Avenue, Mount Vernon, N.Y. The defendant Marshal appeared on June 13, 1973 to remove the plaintiff and her possessions from her apartment. Brooks told the Marshal that she wanted to call someone to store her furniture. The Marshal responded that she could not get anyone to store her furniture and that the man with him, defendant Flagg, would store her furniture. Flagg informed Brooks that she would have to pay \$65 per month for moving and storage. Believing she had no choice, Brooks agreed. After the goods were loaded onto one of Flagg Brothers' trucks,

one of the moving men told Brooks that she would have to pay \$175 (\$75 per month for storage, \$75 for barrelling and platforming and \$28 for fumigating).

After her eviction, Brooks and her children moved into her cousin's apartment at 120 North Kensco Avenue, White Plains, New York. On June 15, 1975 the plaintiff called Flagg Brothers and was informed that she owed an additional \$156. When she went to Flagg Brothers' office, she was told that the \$178 was considered only a deposit. She was also advised that the storage charges were on a "per month" basis so that an additional \$75 would be due on July 1, rather than on July 13 as she had thought.

Subsequent communications between Brooks and Flagg Brothers include: Flagg's secretary advising Brooks that the plaintiff could only obtain her possessions if she paid \$484 in cash; a letter from Flagg Brothers in the form of a "Final Notice" that unless payment was made Flagg Brothers would advertise her goods for public auction. Prior to August, 1973, Brooks had been unable to remove her goods because of insufficient space in her cousin's apartment.

OPINION GRANTING PARTIES' MOTIONS TO INTERVENE

It appears that the goods have now been returned to plaintiff Brooks in their entirety. She has no claim for injunctive relief but only a claim for damages and declaratory relief.

II

MOTIONS TO INTERVENE

(1) Jones' Motion to Intervene as Plaintiff

Because Brooks' case for injunctive relief has been dissipated, the same lawyers now seek intervention on behalf of Gloria Jones. In her proposed intervenor's complaint, Jones virtually tracks the jurisdictional^{3/} and class action allegations that appear in Brooks' complaint.

Jones is a New York citizen, residing alone at 670 Lincoln Avenue, Mount Vernon, New York. She has a weekly income of \$87.00 after taxes. The defendants are Flagg and Flagg Brothers. She does not name the Marshal.

^{3/} Jones limits herself to 42 U.S.C. § 1983, 28 U.S.C. § 1343(3) and 28 U.S.C. §§ 2201, 2202. She omits as a basis for jurisdiction 42 U.S.C. § 1985, 28 U.S.C. § 1343(1), (4).

Jones alleges that on December 26, 1973 the Marshal came to remove her and her possessions pursuant to an order of eviction entered against Jones by the City Court of Mount Vernon. The Marshal repeated what he had told Brooks that Jones could not get anyone to store her furniture and other possessions and that the man with him, an employee of Flagg Brothers, was the man who would store her goods.

Unlike Brooks, Jones did not agree to Flagg Brothers storing her goods. Nor was she advised of the storing rate. Nonetheless, Flagg Brothers took the goods to its storage warehouse.

~~complaint~~, After her eviction, Jones moved to her current address. She spoke to Flagg Brothers in March 1974 and ~~was~~ told she would have to pay \$600 to obtain her goods. She was also told that had she not contacted Flagg Brothers at that time the goods would have been sold immediately.

Thereafter, Jones complained of the high price noting that she had not contracted to pay for the storage. The defendants told her that the bill was only \$500 and

that if she did not pay the entire sum by April 12, 1974^{4/} the goods would be sold. Jones cannot afford to pay.

Jones urges that the imposition of a warehousemen's lien and the threatened sale (U.C.C. §§ 7-209-210) without a prior hearing are actions under color of state law which violate plaintiff's due process rights under the Fourteenth Amendment.

Like the Brooks' complaint, the Jones' complaint seeks declaratory and injunctive relief and damages.

In an answering affidavit, Flagg's attorney avers that defendants have advised plaintiff's counsel that the defendants have no intention of selling the goods and if they do decide to sell them, plaintiff's counsel will be notified "well in advance of any sale."^{5/} Plaintiff's counsel has sworn in a reply affidavit that because of these assurances he has not sought a temporary restraining order on behalf of Jones.

^{4/} ¶ 17

^{5/} Altman Affd. ¶ 5

Jones' motion is for permissive intervention (Fed. R. Civ. P. 24(b)(2)) and as part of her representation of a class (Rule 23).

No class determination under Rule 23 has yet been considered by the Court.

Rule 24(b)(2) provides in part: "Upon timely application anyone may be permitted to intervene in an action: . . . (2) when an applicant's claim or defense and the main action have a question of law or fact in common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

Having eliminated Brooks as a plaintiff for injunctive relief, the defendants now seek to eliminate the proposed intervenor Jones by telling her that they have no intention of selling her goods, and that she would, in any event, be notified well in advance of the sale. If the defendants made the same promise each time a plaintiff challenged them, or even gave the goods back each time, they would have a continuing argument that there is no justiciable controversy and that the particular plaintiff had no standing.

OPINION GRANTING PARTIES' MOTIONS TO INTERVENE

The situation is analogous to the problem presented in Southern Pacific Terminal Co. v. Interstate Commerce Comm'n, 219 U.S. 498 (1911), where the Court held it had jurisdiction to determine whether an order of the I.C.C. should be enjoined, even though the order had by then expired. "The questions involved in the orders of the Interstate Commerce Commission are usually continuing (as are manifestly those in the case at bar) and their consideration ought not be, as they might be, defeated, by short term orders, capable of repetition, yet evading review." (219 U.S. at 515.)

In the case at bar, the practices of the defendants under a continuing statute cannot be kept from judicial scrutiny by quick settlements or apologies. The threat alleged by Mrs. Jones that her furniture would be sold if she did not pay makes this a case or controversy, certainly for purposes of a declaratory judgment. Her property is concededly in the defendants' possession and the threat has been alleged. The defendants' position remains that storage fees are due and that Jones is responsible for them. Even though the threat of sale did not succeed

OPINION GRANTING PARTIES' MOTIONS TO INTERVENE

in "coercing" a "voluntary" payment by Jones, defendants still maintain they do have recourse to § 7-210 procedures. The fact that they agreed not to invoke § 7-210 during this suit does not affect Jones' action in terms of its ripeness any more than had Jones sought and won a restraining order. Since the threat of sale would have been sufficient for ripeness for purposes of a restraining order, it is also sufficient here. See Hart & Wechsler, The Federal Court and Federal System 139 n.5 (1953).

Similarly, the status quo accord does not diminish Jones' interest for purposes of standing. She has alleged "such a personal stake in the outcome of the controversy as to assure that the concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions. . . ." Baker v. Carr, 369 U.S. 186, 204 (1962). Jenkins v. McKeithen, 395 U.S. 411, 423 (1969).

While it is true that the factual patterns in Jones' complaint differ from Brooks', the legal issue remains the same, whether the decision of Magro v. Lentini Bros. Moving & Storage Co., 338 F. Supp. 464 (E.D.N.Y. 1971),

aff'd per curiam on opinion below, 460 F.2d 1064 (2 Cir.), cert. denied, 406 U.S. 961 (1972), upholding the constitutionality of § 7-210 has continuing vitality in light of Fuentes v. Shevin, 407 U.S. 67 (1972) and Hernandes v. European Auto Collision, Inc., 487 F.2d 378 (2 Cir. 1973). Accordingly, permissive intervention is appropriate. Boone v. Wyman, 295 F. Supp. 1143 (S.D.N.Y. 1969, Mansfield, J.).

(2) Motions to Intervene as Defendants

(a) The American Warehousemen's Ass'n ("AWA") is a non-profit organization incorporated in Illinois, with its principal place of business in Illinois. It is the national trade association for the public merchandise warehousing industry, having 478 members who operate in every state (including New York) except four. Its members' warehouses account for approximately 1,801,218,000 cubic feet of warehouse space -- about 75% of all public merchandise warehouse space in the United States.

(b) The International Association of Refrigerated Warehouses ("IARW") is a non-profit Delaware corporation with its principal offices in Washington, D.C.

It is the national trade association for the public refrigerated warehousing industry, having 218 member companies in the United States who operate 432 public refrigerated warehouses in all states including New York but excluding four states. The membership accounts for 567,000,000 cubic feet of public refrigerated warehouse space which represents over 75% of the total public refrigerated warehouse space in the United States.

Both the AWA and IARW argue that since the U.C.C. (including the provisions of §§ 7-209 and 7-210) has been adopted in 49 states, a holding that §§ 7-209 and 7-210 are unconstitutional would adversely affect their membership. While they claim there are common issues of law, they assert intervention is appropriate because their interests may differ from Flagg Brothers'. They note that Flagg Brothers deals with the public -- storing furniture -- while they deal with commodities in commerce. They contend that if the statute is held to be unconstitutional it would affect them as well, without the Court having been acquainted with the problems of their industry. Both seek intervention pursuant to Fed. R. Civ. P. 24(a) and 24(b).

(c) The Warehousemen's Association of the Port of New York ("WAPNY") is a trade association incorporated in New York consisting of many public warehousemen doing business in the City of New York and metropolitan New Jersey area. The members store, handle and distribute merchandise, commodities and materials of every character and description.

(d) The Cold Storage Warehousemen's Association of the Port of New York ("CSWAPNY") is an unincorporated trade association, with a membership in the same geographical vicinity as WAPNY. Their activities consist primarily of the storage, handling and distribution of perishable foods and other commodities that require refrigerated facilities for their storage.

that Flagg Brothers deals with the but

In response to the motions of all four proposed intervening defendants the plaintiff urges that their proper role should be that of amicus curiae, not party defendants.

I disagree. As was not the case in Sierra Club v. Morton, 405 U.S. 727 (1972), the proposed intervenors

have alleged that its members themselves would be affected by a declaration that §§ 7-209 and 7-210 are unconstitutional (cf. 405 U.S. at 735.) It is plain that at least the New York members of the intervenors have substantial interest in upholding the constitutionality of the provisions here attacked, with non-New York members in states which have adopted the U.C.C. also interested.

Under Rule 24 (b) one may be permitted to intervene in an action "(2) when an applicant's claim or defense and the main action have a question of law or fact in common."

It might have been thought, as is indeed suggested by the objecting plaintiff, that where merely a question of law is involved the intervenor should be remitted to the status of an amicus curiae. That makes some sense because the judgment here would not be res judicata on any claim or defense of the proposed intervening defendants.

The test of permissive intervention is broader however. First, the rule reads in the disjunctive -- question of law or fact -- so that intervention may be permitted where the question of law, though not of fact, is common. Second, the words "claim or defense" have not

OPINION OF GURFEIN GRANTING PARTIES' MOTIONS TO INTERVENE

been read in a technical sense, but permissive intervention has been upheld even where in Professor Moore's phrase "the existence of any nominate 'claim' or 'defense' is difficult to find." Moore, Federal Practice, ¶ 24.10[2], 24-354.

PROVISIONS A ground for intervention is "economic interest,"

Cascade Natural Gas Corp. v. El Paso Natural Gas Co.,

386 U.S. 129, 135 (1967) (intervention by California allowed because its interests in a competitive system of natural gas distribution); ^{6/} Nuesse v. Camp, 385 F.2d 694

(D.C. Cir. 1967); Textile Workers Union of America v. Allendale Co., 226 F.2d 765, 769 (D.C. Cir. 1955) ("a real economic stake in the outcome of this litigation"); Champ v. Atkins, 128 F.2d 601 (D.C. Cir. 1942).

status of It is, of course, true that in some situations a general economic interest would not be enough. But in this situation where specific segments of an industry would be vitally affected by a declaration that the statute which

however, that, the rule reads in the disjunctive --

^{6/} Though Cascade was a Rule 24(a) intervention, the principle should apply to 24(b) intervention as well.

governs their business conduct is unconstitutional, there is little reason to exclude them from participation. As Judge Leventhal said in Nuesse v. Camp, supra at 700: ". . . the 'interest' test is primarily a practical guide to disposing of law suits by involving as many apparently concerned persons as is compatible with efficiency and due process." The tendered answers of the proposed intervenors do not raise complicated questions of fact. On being permitted to intervene, their activity will be controlled by appropriate orders of the Court.

The four motions to intervene as party defendants are granted pursuant to Fed. R. Civ. P. 24(b)(2).

(3) The State Attorney General of the State of New York is permitted to intervene on consent.

Further caption in the action shall include the names of the intervening parties.

It is so ordered.

June 25, 1974

MURRAY L. GURFEN

U.S.D.J.

NOTICE OF MOTION TO DISSOLVE THREE-JUDGE COURT
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SHIRLEY HERRIOT BROOKS, individually and
on behalf of all others similarly
situated,

Plaintiffs,

and

GLORIA JONES,

Plaintiff-Intervenor,

-against-

FLAGG BROTHERS, INC. individually and as
representative of a class of all others
similarly situated, HENRY FLAGG, individ-
ually and as President of FLAGG BROTHERS,
INC.,

Defendants,

and

THE ATTORNEY GENERAL OF THE STATE OF NEW
YORK, THE AMERICAN WAREHOUSEMEN'S ASSOC-
IATION; THE INTERNATIONAL ASSOCIATION OF
REFRIGERATED WAREHOUSES, INC. THE WARE-
HOUSEMEN'S ASSOCIATION OF THE PORT OF NEW
YORK; and THE COLD STORAGE WAREHOUSEMEN'S
ASSOCIATION OF THE PORT OF NEW YORK,

Defendants-Intervenors.

73 Civ. 4050 H.F.W.
Notice of Motion
to Dissolve
Three-Judge Court

PLEASE TAKE NOTICE that plaintiffs will move
this court at a Motion Term, to be held at the United
States Courthouse in Room 1505, Foley Square, New York,
New York on the 5th day of May, 1975, at 10:00 a.m. or
as soon thereafter as counsel can be heard for an order
pursuant to 28 U.S.C. §2281 dissolving the three-judge
court convened in this action on November 18, 1974, and
remanding the action to the single district judge, and
for such other and further relief as this Court may find
just and proper.

NOTICE OF MOTION TO DISSOLVE THREE-JUDGE COURT

The ground of this motion, as is more fully set forth in plaintiffs' memorandum of points and authorities in support of motion to dissolve three-judge court, is that a three-judge court is not required or authorized by 28 U.S.C. §2281 because the complaint does not seek to restrain "the action of any officer of [the] State in the enforcement or execution of a [State] statute _ _ _ ."

Dated: April 22, 1975
White Plains, New York

Respectfully submitted,

Martin A. Schwartz

The Legal Aid Society of
Westchester County

By: Martin A. Schwartz,
of Counsel

Lawrence S. Kahn,
of Counsel

56 Grand Street

White Plains, New York 10601

Tel: (914) 761-9200

Attorneys for Plaintiff and
Plaintiff-Intervenor

ENDORSED MEMO GRANTING MOTION TO DISSOLVE THREE-JUDGE COURT

Index No. 73 CIV. 4050
 Year 1975
 United States District Court
 Southern District of New York
 Shirley Herriot Brooks, et al.
 Plaintiff,
 -against-
 FLAGG BROTHERS, INC., et al.
 Defendants.

Notice, etc.,
 Aid Society of Westchester County

Office and Post Office Address
 86 GRAND STREET
 WHITE PLAINS, N. Y. 10601

NOTICE OF SETTLEMENT
 a take notice that an order

within is a true copy will be presented
 to the Hon.

Notice of the within named Court,
 day of 19
 At

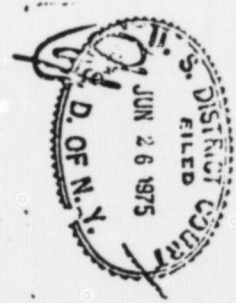
Notice, etc.,
 Aid Society of Westchester County

Office and Post Office Address
 86 GRAND STREET
 WHITE PLAINS, N. Y. 10601

Notice of Motion to Dissolve
 Three-Judge Court

THE LEGAL AID SOCIETY OF WESTCHESTER COUNTY
 Attorney for Plaintiffs.
 Office and Post Office Address, Telephone
 86 GRAND STREET
 WHITE PLAINS, N. Y. 10601
 914-781-8200

To
 Attest: for
 Certificate of a copy of the within
 is hereby submitted.



Handwritten signatures and notes:
 6/18/75
 in open court
 [Signature]

MICROFILM
 JUN 26 1975

NOTICE OF MOTION FOR CLASS ACTION DETERMINATION, AND
SUMMARY JUDGMENT, AND SUPPORTING PAPERS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
SHIRLEY HERRIOTT BROOKS, individually :
and on behalf of all others similarly :
situated, :

Plaintiffs, :

and :

GLORIA JONES, :

Plaintiff-Intervenor, :

- against - :

FLAGG BROTHERS, INC., individually and :
as representative of a class of all :
others similarly situated, HENRY FLAGG, :
individually and as President of Flagg :
Brothers, Inc., :

Defendants, :

and :

THE ATTORNEY GENERAL OF THE STATE OF NEW :
YORK; THE AMERICAN WAREHOUSEMEN'S ASSOCI- :
ATION; THE INTERNATIONAL ASSOCIATION OF :
REFRIGERATED WAREHOUSES, INC.; THE WARE- :
HOUSEMEN'S ASSOCIATION OF THE PORT OF NEW :
YORK; and THE COLD STORAGE WAREHOUSEMEN'S :
ASSOCIATION OF THE PORT OF NEW YORK, :

Defendant-Intervenors. :

-----X

TO THE DEFENDANTS AND DEFENDANT-INTERVENORS:

PLEASE TAKE NOTICE that upon the annexed affidavits and the
exhibits annexed thereto and upon defendant Flagg Brothers'
answers to interrogatories, and upon all the papers previously
filed in this action, plaintiffs and the plaintiff-intervenor will
move this Court at a Motion Term to be held in Room 706 of the
United States Courthouse, Foley Square, New York, New York, on the
9th day of ~~August~~ ^{September}, 1974, at 10:00 A. M., or as soon thereafter
as counsel can be heard:

NOTICE OF MOTION FOR CLASS ACTION DETERMINATION, AND
SUMMARY JUDGEMENT, AND SUPPORTING PAPERS

1. For an order pursuant to Rule 23 of the Federal Rules of Civil Procedure determining this action to be a proper plaintiff and defendant class action;

The grounds of that motion, as are more fully set forth in the annexed affidavits, exhibits, the answers to interrogatories, and the memorandum of points and authorities submitted in support of this motion are that with respect to both the plaintiff and defendant classes, all of the requirements of Rule 23(a) are satisfied in that the class is so numerous that joinder of all members is impracticable, the questions of law and fact are common to the class, namely, the constitutionality of New York Uniform Commercial Code, §§7-209 and 210, the claims and defenses of the representative parties are typical of the claims and defenses of the class, and the representative parties will fairly and adequately protect the interests of the classes. In addition, the requirement of Rule 23(b) is met in that the defendants have acted and refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the classes as a whole.

2. For an order pursuant to Rule 56 of the Federal Rules of Civil Procedure granting plaintiff and the plaintiff-intervenor and the class the, represent summary judgment for the injunctive and declaratory relief prayed for in the complaint and on all issues except the amount of damages.

The grounds of this motion, as are more fully set forth in the annexed affidavits and exhibits and in plaintiffs' memorandum of points and authorities in support of this motion,

NOTICE OF MOTION FOR CLASS ACTION DETERMINATION, AND
SUMMARY JUDGMENT, AND SUPPORTING PAPERS

are that there is no genuine issue as to any material fact and that the plaintiffs are entitled to judgment as a matter of law in that New York Uniform Commercial Code §§209 and 210 violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution in that these provisions authorize the imposition of a lien and sale of bailed goods by a warehouse company without a prior hearing.

Plaintiffs further move pursuant to Rule 56(d) of the Federal Rules of Civil Procedure that if summary judgment is not rendered upon the whole case or for all the relief prayed for and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted.

PLEASE TAKE FURTHER NOTICE that answering memoranda and affidavits, if any, must be served on counsel for plaintiffs at least three days prior to the return date of this motion.

Respectfully submitted,

Martin A. Schwartz

Dated: August 26, 1974
White Plains, New York.

THE LEGAL AID SOCIETY OF WEST-
CHESTER COUNTY

By: Martin A. Schwartz, of Counsel
Lawrence S. Kahn, of Counsel

Attorneys for Plaintiffs and
Plaintiff-Intervenor

Office and P. O. Address:
56 Grand Street

White Plains, New York 10601
Tel. No. (914) 761-9200

NOTICE OF MOTION FOR CLASS ACTION DETERMINATION, AND
SUMMARY JUDGMENT, AND SUPPORTING PAPERS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
SHIRLEY HERRIOTT BROOKS, et al., :

Plaintiffs, : 73 Civ. 4050 M.I.G.

- against - :

FLAGG BROTHERS, INC., et al., :

Defendants. :
-----x

AFFIDAVIT IN SUPPORT
OF MOTION FOR A CLASS
ACTION DETERMINATION

STATE OF NEW YORK)
) SS.:
COUNTY OF WESTCHESTER)

MARTIN A. SCHWARTZ, being duly sworn, deposes and says that:

1. I am an attorney duly admitted to practice law in the State and in this Court. I am associated with The Legal Aid Society of Westchester County, attorneys for plaintiffs herein. I am fully familiar with all of the proceedings in this action. I make this affidavit in support of plaintiffs' motion for a class action determination.

2. On or about December 13, 1973, plaintiffs' counsel served upon defendant Flagg Brothers' counsel written interrogatories. A copy of these interrogatories are annexed hereto as Exhibit "A".

3. On or about January 14, 1974, defendant Flagg Brothers served upon counsel for plaintiffs answers to plaintiffs' written interrogatories. A copy of the answers to interrogatories are annexed hereto as Exhibit "B".

4. The answers to interrogatories state that: 1) "In the year 1973, approximately 567 contracts for moving and approximately 70 contracts for storage were entered into by Flagg Brothers, Inc.";

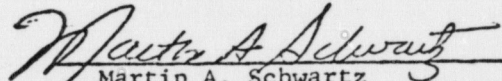
NOTICE OF MOTION FOR CLASS ACTION DETERMINATION, AND
SUMMARY JUDGMENT, AND SUPPORTING PAPERS

and 2) "In the year 1973, there were approximately 65 'Final Notices' given to customers of Flagg Brothers, Inc."

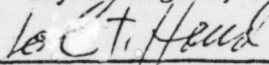
5. A "Class Action Stipulation-Defendant Class" filed in this action substantiates that there are "approximately 200 to 300 warehouses located within the State of New York." A copy of this stipulation is annexed hereto as Exhibit "C".

6. The material set forth in paragraphs 3, 4 and 5 above substantiates that the classes are sufficiently numerous to satisfy the numerosity requirement of Rule 23(a) of the Federal Rules of Civil Procedure.

WHEREFORE, your deponent respectfully prays that this Court grant plaintiffs' motion for a plaintiff and defendant class action.


Martin A. Schwartz

Sworn to before me this
15th day of August, 1974.



JOHN T. HAND
Notary Public, State of New York
No. 60-6754030
Qualified in Westchester County
Term Expires March 30, 1976

NOTICE OF MOTION FOR CLASS ACTION DETERMINATION, AND
SUMMARY JUDGMENT AND SUPPORTING PAPERS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SHIRLEY HERRIOTT BROOKS, individually
and on behalf of all others similarly
situated,

Plaintiffs,

-against-

FLAGG BROTHERS, INC., individually and
as representative of a class of all
others similarly situated, HENRY FLAGG,
individually and as President of Flagg
Brothers, Inc., and JAMES A. LEVISTER,
individually and as City Marshall of
the City of Mount Vernon, New York,

Defendants.

INTERROGATORIES

73 Civ. 8050 C.H.T.

TO: RICHARD GATES, ESQ.
ARRON, BRUNAN & GATES
38 North Broadway
Jericho, New York 11753
Attorney for Defendants, Flagg Brothers, Inc.
and Henry Flagg

DAVID HOFFENBERG, ESQ.
Law Department
City Hall
Mount Vernon, New York 10550
Attorney for Defendant Levister

The plaintiffs in the above entitled action request
that defendant, Henry Flagg, answer under oath the following
interrogatories in accordance with Rule 33 of the Federal Rules
of Civil Procedure:

1. State the exact or approximate number of contracts
for moving and storage entered into by Flagg Brothers during
(a) 1971, (b) 1972, and (c) 1973. If the exact or approximate
number is not known and is not reasonably ascertainable, state
whether the numbers are in excess of (a) 50, (b) 100, (c) 200,
(d) 500, (e) 1,000, (f) 2,000.

NOTICE OF MOTION FOR CLASS ACTION DETERMINATION, AND
SUMMARY JUDGMENT AND SUPPORTING PAPERS

2. State the exact or approximate number of "Final Notices" (Exhibit "C" to complaint herein) given to customers of Flagg Brothers, Inc. by Flagg Brothers, Inc. during (a) 1971, (b) 1972, and (c) 1973. If the exact or approximate number is not known, state whether the numbers are in excess of (a) 50, (b) 100, (c) 200, (d) 500, (e) 1,000, (f) 2,000.

3. State the exact or approximate numbers of sales pursuant to New York U.C.C. §7-210 to ^{entire} authorize the liens authorized by New York U.C.C. §7-209 made by defendant Flagg Brothers during (a) 1971, (b) 1972, and (c) 1973.

PLEASE TAKE NOTICE, that a copy of the answer to the above interrogatories must be served upon the undersigned within 30 days after the service of these interrogatories.

Dated: December 13, 1973

THE LEGAL AID SOCIETY OF
WESTCHESTER COUNTY
Attorneys for Plaintiffs
by: Gene P. Reibman, of Counsel
Martin A. Schwartz, of Counsel
Office and P. O. Address
56 Grand Street
White Plains, New York 10601
Tel. (914) 761-9200

NOTICE OF MOTION FOR CLASS ACTION DETERMINATION, AND
SUMMARY JUDGMENT AND SUPPORTING PAPERS

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

SHIRLEY HERRIOTT BROOKS, individually
and on behalf of all others similarly
situated,

73 CIV. 4050

Plaintiffs,

- against -

ANSWER TO PLAINTIFF'S
INTERROGATORIES

FLAGG BROTHERS, INC., individually and
as representative of a class of all others
similarly situated, HENRY FLAGG, individu-
ally and as President of Flagg Brothers,
Inc., and JAMES A. LEVISTER, individually
and as City Marshall of the City of Mount
Vernon, New York,

Defendants.

TO: THE LEGAL AID SOCIETY OF WESTCHESTER COUNTY
56 Grand Street
White Plains, New York 10601
Attorneys for Plaintiffs

DAVID HOFFENBERG, ESQ.
Law Department
City Hall
Mount Vernon, New York 10550
Attorney for Defendant Levister

The defendant HENRY FLAGG responding to the inter-
rogatories of the plaintiff alleges as follows:

1. (a) In the year 1971, approximately 304 contracts
for moving and approximately 43 contracts for storage
were entered into by FLAGG BROTHERS, INC.

(b) In the year 1972, approximately 529 contracts
for moving and approximately 70 contracts for storage were
entered into by FLAGG BROTHERS, INC.

(c) In the year 1973, approximately 567 contracts
for moving and approximately 70 contracts for storage were
entered into by FLAGG BROTHERS, INC.

2. (a) In the year 1971 there were no "Final Notices"
given to customers of FLAGG BROTHERS, INC.

(b) In the year 1972, there were no "Final Notices"
given to customers of FLAGG BROTHERS, INC.

EXHIBIT "A"

NOTICE OF MOTION FOR CLASS ACTION DETERMINATION, AND
SUMMARY JUDGMENT AND SUPPORTING PAPERS

(c) In the year 1973, there were approximately
65 "Final Notices" given to customers of FLAGG BROTHERS,
INC.

(a) In the year 1971, there were no sales
pursuant to New York Uniform Commercial Code Section 7-210.

(b) In the year 1972, there were no sales
pursuant to New York Uniform Commercial Code Section 7-210.

(c) In the year 1973, there were approximately
18 sales.

Dated: New York, New York
January 14, 1974

ALVIN ALTMAN
BRODSKY, LINETT & ALTMAN
Attorneys for defendants
FLAGG BROTHERS, INC. and
HENRY FLAGG
Office & P. O. Address
1776 Broadway
New York, New York 10019
212/245-7700

NOTICE OF MOTION FOR CLASS ACTION DETERMINATION, AND
SUMMARY JUDGMENT AND SUPPORTING PAPERS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
SHIRLEY HERRIOTT BROOKS, VIVIAN MORANT,
individually and on behalf of all others
similarly situated,

Plaintiffs,

-against-

FLAGG BROTHERS, INC., ALLIANCE FIREPROOF
WAREHOUSE, INC., UNIQUE MOVING AND
STORAGE CO., INC., individually and as
representative of a class of all others
similarly situated, HENRY FLAGG,
individually and as President of Flaggs
Brothers, Inc., and MICHAEL ROSS,

Defendants,

and

NEW YORK STATE MOVERS & WAREHOUSEMAN'S
ASSOCIATES, INC.,

Intervenor-Defendant.
-----X

CLASS ACTION

STIPULATION

DEFENDANT CLASS

73 CIV. 4050

IT IS HEREBY STIPULATED AND AGREED by and
between the attorneys for the parties in the above entitled
action that this consolidated action is a proper class action
pursuant to Rule 23 of the Federal Rules of Civil Procedure.

The members of the defendant class consist of
all warehousemen, as defined by New York Uniform Commercial Code
§7-102 (h), doing business in the State of New York who impose
liens upon goods stored with such warehousemen pursuant to
Section 7-209 of the New York Uniform Commercial Code and who
subject such goods to sale pursuant to Section 7-210 of the
New York Uniform Commercial Code without affording the owner
of the goods notice and an opportunity for a judicial hearing
prior to imposition of the lien and the sale of the goods.

NOTICE OF MOTION OF CLASS ACTION DETERMINATION, AND
SUMMARY JUDGMENT AND SUPPORTING PAPERS

This action is a proper class action because:

- (a) the defendant class, consisting of approximately 200 to 300 warehouses located within the State of New York, is so numerous that joinder of all members is impracticable; (b) there are questions of law common to the class, namely, the constitutional validity of New York Uniform Commercial Code §§ 7-209 and 7-210; (c) the defenses and claims of the representative defendants are typical of the claims of the members of the class; (d) the law firm of Brodsky, Linett and Altman as attorneys for defendants Flagg, Flagg Brothers, Inc., and for Intervenor-Defendant New York State Movers & Warehouseman's Associates, Inc., will adequately protect the interest of the defendant class; and (e) the party opposing the class has acted on grounds generally applicable to the class thereby making appropriate declaratory relief with respect to the class as a whole.

/s/ Martin A. Schwartz
GENE F. REIDMAN & MARTIN A. SCHWARTZ,
of counsel
THE LEGAL AID SOCIETY OF WESTCHESTER
COUNTY
Attorneys for Plaintiff Brooks
Office & P.O. Address
56 Grand Street
White Plains, New York 10601
(914) 161 - 9200

/s/ Louis B. York
LOUIS B. YORK, ESQ.
Attorney for Plaintiff Morant
Manhattan Legal Services Corp.
170 East 116th Street
New York, New York 10029
(212) 427 - 0693

NOTICE OF MOTION FOR CLASS ACTION DETERMINATION, AND
SUMMARY JUDGMENT AND SUPPORTING PAPERS

William L. Brodsky, Linell & Altman
BRODSKY, LINELT & ALTMAN
Attorneys for Defendants Flagg,
Flagg Brothers, Inc., and
Intervenor-Defendant New York State
Movers & Warehousemen's
Associates, Inc.
1776 Broadway
New York, New York 10019
(212) 245 - 7700

Ivan Tanileff
IVAN TANILEFF
Attorney for Alliance Fireproof
Warehouse, Inc., Unique Moving
& Storage Co. Inc., and Michael
Ross
32 Court Street
Brooklyn, New York 11201
(212) 522 - 4604

DATED: February 1974

SO ORDERED:

U. S. DISTRICT COURT JUDGE

EXHIBIT "C-2"

NOTICE OF MOTION FOR CLASS ACTION DETERMINATION, AND
SUMMARY JUDGMENT AND SUPPORTING PAPERS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
SHIRLEY HERRIOTT BROOKS, et al.,

Plaintiffs,

- against -

FLAGG BROS., INC., et al.,

Defendants.
-----x

73 Civ. 4050 M.I.G.

AFFIDAVIT IN SUPPORT
OF MOTIONS FOR A CLASS
ACTION DETERMINATION AND
SUMMARY JUDGMENT

STATE OF NEW YORK)
) SS.:
COUNTY OF WESTCHESTER)

SHIRLEY HERRIOTT BROOKS, being duly sworn, deposes and says:

1. I am the plaintiff in this action, and I am a citizen of the United States and of the State of New York. I have personal knowledge of all of the facts set forth herein. I make this affidavit in support of plaintiffs' motion for a class action determination and summary judgment.

1a. I reside at 120 North Kensico Avenue, White Plains, New York, with my three children, George, Jr., age 13, Tonya, age 12 and Michael, age 11. My husband died in an automobile accident approximately two years ago. I am employed as a homemaker for which I earn \$2.50 per hour.

2. In the Spring of 1973, my family and I were residing at 33 North 3rd Avenue, Mount Vernon, New York. My landlord had obtained an order of eviction against me and on June 13, 1973, James A. Levister, the City Marshal of the City of Mount Vernon, New York, appeared at my residence to dispossess my family and I from our residence.

NOTICE OF MOTION FOR CLASS ACTION DETERMINATION, AND
SUMMARY JUDGMENT AND SUPPORTING PAPERS

3. I informed Mr. Levister at that time, on June 13, 1973, that I wanted to call someone to store my furniture and other household possessions. Mr. Levister informed me that I would not be able to get anyone to store my furniture and that there was a man with him, defendant Henry Flagg, who would store my furniture. I was led to believe by Mr. Levister's comments that I had no choice but to let defendant Flagg store my goods.

4. I then asked defendant Flagg how much it would cost to move and store my goods. Defendant Flagg informed me that I would have to pay \$65.00 per month for the moving and storage of the furniture. I told defendant Flagg that this sounded like a high price, but as I believed that I had no choice in the matter, I told defendant Flagg to proceed with the moving and storage of my furniture and household possessions.

5. After my goods were loaded on one of the defendant Flagg Brothers' trucks, a moving man told me that I would have to pay \$178.00. I protested since I had been told that \$65.00 was the entire cost. The moving man explained that I would have to pay \$75.00 per month for storage, \$75.00 for barrelling and platforming, and \$28.00 for fumigating for a total of \$178.00. I asked whether I had to have fumigating and the moving man responded that fumigating was required. I believed that I had no choice in the matter but to pay and, after first insisting on payment in cash, defendant Flagg agreed to accept my check for \$178.00.

6. After I was evicted, my children and I moved into my cousin's apartment at 120 North Kensico Avenue, White Plains, New York.

NOTICE OF MOTION FOR CLASS ACTION DETERMINATION, AND
SUMMARY JUDGMENT AND SUPPORTING PAPERS

7. On or about June 15, 1973, I called defendant Flagg Brothers in order to find out how long they would store my goods for the \$178.00 payment. An employee of defendant Flagg Brothers informed me that I owed defendant Flagg Brothers an additional \$156.00.

8. On or about June 19, 1973, I went to defendant Flagg Brothers' office in Mount Vernon, New York. I was there given a "Combined Uniform Household Goods Bill of Lading and Freight Bill" indicating that defendant Flagg Brothers regarded the \$178.00 payment as a "deposit" and that there was a "balance due" of \$156.00. A copy of this Bill of Lading and Freight Bill is annexed hereto as Exhibit "A". I informed defendant Henry Flagg that his prices were unreasonable and that I couldn't afford to pay them. Defendant Flagg informed me that on the first day of July, 1973, I would owe an additional \$75.00 for storage for the month of July. I told defendant Flagg that my one month's storage payment of June 13, 1973, should run to July 13, 1973. Defendant Flagg informed me that storage charges are incurred on a "per month" basis, and that even if my goods had been stored on June 29, 1973, an additional \$75.00 would be due by July 1, 1973.

9. On or about June 29, 1973, I telephoned defendant Henry Flagg. During the course of the telephone conversation, defendant Flagg offered to let me remove my goods by July 13, 1973 if I would pay the balance of the original bill allegedly then due in the amount of \$156.00 plus \$45.00. I restated my position to defendant Flagg that my original payment should cover the storage of the goods from June 13, 1973, to July 13, 1973. Furthermore, I was unable to remove my goods by July 13, 1973, because I was

NOTICE OF MOTION FOR CLASS ACTION DETERMINATION, AND
SUMMARY JUDGMENT AND SUPPORTING PAPERS

still sharing an apartment with my cousin and there was insufficient space in the apartment for my belongings.

10. Approximately one week later, in early July, 1973, I again telephoned defendant Henry Flagg, this time to arrange for a delivery date for my goods. Mr. Flagg's secretary gave me a date of August 14, 1973, and told me that I could obtain my possessions only if I paid \$484.00 in cash. I was told that this amount included the past balance allegedly due. I then spoke to defendant Flagg and was told by him that payment has to be in cash and checks or money orders would not be accepted.

11. On or about August 25, 1973, I received a letter dated August 22, 1973, from defendant Flagg Brothers stating that:

"Your account has to be brought
up to date within 10 days of the
date of this letter (Sept. 1, 1973)
or your furn. will go up for sale.
It, (your storage payments) have to
be paid each month on the 1st and
has to be kept up or your furniture
will be sold. Your previous bal.
from Moving due \$156.00
Storage for 7/73 & 8/73 \$150.00 at \$75.
a month
Total Due \$306.00"

A copy of this letter is annexed hereto as Exhibit "B".

Accompanying this letter from defendant Flagg Brothers was a "Final Notice" noted August 22, 1973, informing me that unless payment on the storage account was made, defendant Flagg Brothers would advertise my goods for public auction. A copy of this Notice is annexed hereto as Exhibit "C".

12. On August 24, 1973, I wrote to defendant Flagg Brother detailing my position and claims regarding defendant Flagg's billing computations and methods. A copy of this letter is annexed hereto as Exhibit "D".

NOTICE OF MOTION FOR CLASS ACTION DETERMINATION, AND
SUMMARY JUDGMENT AND SUPPORTING PAPERS

13. On August 23, 1973, my attorney wrote to defendant Flagg Brothers contesting defendant Flagg Brothers' constant change in warehouse fees allegedly due. A copy of this letter is annexed hereto as Exhibit "E". Defendant Flagg's letter dated August 30, 1973, in response to my letter, states in part that "Her storage bill is past due and must be brought up to date immediately to avoid the sale of her furniture, or before we initiate public auction proceedings." A copy of this letter is annexed hereto as Exhibit "F".

14. All of my goods stored consisted of essential items of household goods and furniture. A list of these goods contained in "Household Goods Descriptive Inventory" prepared by defendant Flagg is annexed hereto as Exhibit "G".

15. Defendant Flagg Brothers' retention of my goods from June 13, 1973, to January 24, 1974, caused my children and I irreparable injury in that we were forced to do without all of the essential items of furniture and household goods set forth in Exhibit "G". My children and I were forced to sleep on the floor on the one remaining mattress that we had. We had to do without most of our clothes and were often forced to wear the same clothes day after day. We ate on paper plates, and had to buy duplicate pots and other household goods. Because my nurses uniforms were stored, I missed one and a half months of work. I had previously been working as a nurses aid earning a take home pay of approximately \$100.00 per week. I did not have sufficient funds to buy duplicate uniforms. I finally saved enough money to buy one uniform so I could return to work. In addition, my children and I had to do without curtains, shades and other household essentials.

NOTICE OF MOTION FOR CLASS ACTION DETERMINATION, AND
SUMMARY JUDGMENT AND SUPPORTING PAPERS

16. On September 21, 1973, my attorney instituted this action for declaratory and injunctive relief and for damages against defendants Henry Flagg and Flagg Brothers, Inc., and James A. Levister, City Marshal of the City of Mount Vernon, New York. By stipulation between my attorneys and the attorney for defendants Flagg and Flagg Brothers, Inc., it was agreed that no storage charge would accrue or be imposed upon me by reason of the storage of my goods with defendants from November 5, 1973, to January 5, 1974, inclusive.

17. On January 24, 1974, pursuant to an agreement made between my attorneys and the attorneys for defendants Henry Flagg and Flagg Brothers, Inc., I was permitted by defendant Flagg Brothers to remove, and did remove, all my goods from the defendant Flagg Brothers' warehouse.

WHEREFORE, your affiant respectfully prays that this Court grant her Judgment pursuant to F. R. Civ. P. 56, and grant for such other and further relief as to the Court may seem just and equitable.

Shirley Herriott Brooks
Shirley Herriott Brooks

Sworn to before me this
15 day of August, 1974.

Martin A. Schwartz

MARTIN A. SCHWARTZ
Notary Public, State of New York
No. 03-3555455
Qualified in Bronx County
Certif. filed in New York County
Commission Expires March 30, 1975

NOTICE OF MOTION FOR CLASS ACTION DETERMINATION, AND
SUMMARY JUDGMENT AND SUPPORTING PAPERS

FLAGG BROS. INC., MOVING & STORAGE

N.Y.C.—M.T. No. 826

247 SO. FIFTH AVENUE

MT. VERNON, N. Y. 10550

914-660-9261 - 212-324-5466

NAME Shirley Brooks Stone Tel. _____
FROM 33 N. Third Ave. Apt. _____
Mt. Vernon, N.Y.
TO Storage Apt. _____
OTHER STOPS _____
MOVING DATE 6/15/73 DAY Wed. TIME _____ A.M.
P.M.

TIME RECORD
Start _____ A.M.
P.M. Customer Initials _____
Finish _____ A.M.
P.M. Customer Initials _____
JOB HOURS 6
TRAVEL TIME 1
TOTAL HOURS 6 1/2

MOVING RATE: _____ VANS _____ MEN 6 \$ _____ Per Job Hr., Plus _____ Hrs. Travel Time

ESTIMATE OR REMARKS
Approx. estimate—packing date—Instructions on job—or other info.)

VALUATION
Customer (Shipper) is required to declare in writing the released value of the property. The agreed or declared value of the property is hereby specifically stated by the customer (shipper) and confirmed by their signature upon to be NOT exceeding 30 () cents per pound per article unless specifically excepted. The Customer (Shipper) hereby declares valuations in excess of the above limits on the following articles:

Article	Value

IMPORTANT
(SIGN BEFORE START OF ANY SERVICE)
The Shipper, subject to and based on the rates, rules, regulations, and conditions in the carriers lawfully published tariff hereby orders the carrier to furnish transportation facilities and service described herein subject to all conditions herein contained including valuation agreed or declared and the conditions on the back hereof which are hereby agreed to by the Shipper and accepted for himself and his assigns. Unless credit arrangements are made in writing the Shipper agrees to pay charges in cash, money order, or certified check prior to complete delivery.

CUSTOMER: Shirley Brooks
By: _____
MOVER: FLAGG BROS. INC., MOVING & STORAGE
By: _____

DELIVERY RECEIPT
Except as specifically endorsed hereon
All services and All articles received in Good Condition

CUSTOMER: Shirley Brooks
By: _____

RATES and DESCRIPTION	CHARGES
MOVING <u>6</u> hours @ <u>2.00</u> per hr.	<u>12.00</u>
OVERTIME _____ hours @ \$ _____ per hr.	
CARTAGE _____ cu. ft. @ \$ _____ per cu. ft.	
WEIGHT _____ lbs. @ \$ _____ per lb.	
PIANO CHGS. _____	
OTHER <u>Travel Time</u>	<u>14.00</u>
Barrels, packed _____ @ \$ _____ each	
<u>15</u> Barrels, loaned _____ @ \$ <u>2.00</u> each	<u>30.00</u>
Wardrobes _____ @ \$ <u>4.00</u> each	
<u>6</u> ^{Back} Cartons or boxes _____ @ \$ <u>1.50</u> each	<u>9.00</u>
<u>5</u> Matt Cartons _____ @ \$ <u>6.00</u> each	<u>30.00</u>
Other _____	
<u>Packing</u>	<u>2.00</u>
Whse. Labor chgs. _____	
Storage chgs. <u>A month</u>	<u>75.00</u>
Other _____	

Insurance: shipper declares the full value of the shipment for the purpose of insurance to be:
Amt. \$ _____ @ \$ _____ per \$100.00

TOTAL CHARGES	<u>334.00</u>
Advance Deposit	<u>172.00</u>
BALANCE DUE	<u>156.00</u>

RECEIVED PAYMENT
MOVER: FLAGG BROS. INC., MOVING & STORAGE
By: _____

CUSTOMER'S BILL & RECEIPT TERMS: Charges Payable in Cash, Money Order, or Certified Check on Delivery.
(For Customer When Job Is Completed)

FORM 852A MILEN PRINTING, INC., 135 SCHMITT BLVD., FARMINGDALE, N.Y. 11735

NOTICE OF MOTION FOR CLASS ACTION DETERMINATION, AND SUMMARY JUDGEMENT AND SUPPORTING PAPERS

Sec. 1. (a) The carrier or party in possession of any of the property herein described shall be liable as at common law for any loss thereof or damage thereto, except as hereinafter provided.

EXCEPTIONS TO ABOVE LIABILITY FOR MECHANICAL, ELECTRICAL OR OTHER OPERATION OR FUNCTIONING, DELAYS, QUARANTINE, STORAGE, TRANSIT OR CONTENTS OF PIECES OR CONTAINERS.

(b) No carrier or party in possession of all or any of the property herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God, the public enemy, the acts of public authority, quarantine, riots, strikes, perils of navigation, the act or default of the shipper or owner, the nature of the property or defect or inherent vice therein. Except in case of negligence of the carrier or party in possession, no carrier or party in possession of all or any of the property herein described shall be liable for the loss or damage thereto or responsible for its condition, operation or functioning, whether or not such property or any part of it is packed, unpacked, or packed and unpacked by the shipper or its agent or its agent. Except in cases of negligence of the carrier or party in possession, no carrier or party in possession of all or any of the property herein described shall be liable for damage to or loss of contents of pieces of furniture, crates, bundles, cartons, boxes, barrels or other containers unless such contents are open for the carrier's inspection and then only for such articles as are specifically listed by the shipper and receipted for by the carrier or its agent.

(c) Except in cases of negligence of the carrier or party in possession, the carrier or party in possession shall not be liable for loss, damage, or delay occasioned by mechanical defect of vehicles or equipment.

(d) Except in case of negligence of the carrier or party in possession the carrier or party in possession shall not be liable for loss, damage, or delay occurring while the property is stopped and held or stored in transit upon request of the shipper, owner, or party entitled to make such request, whether such request was made before or after the carrier comes into possession of the property.

(e) In case of quarantine the property may be discharged at the risk and expense of the owners into quarantine depot or elsewhere, as required by quarantine regulations, or authorities, and in such case, carrier's responsibility shall cease when the property is so discharged, or property may be returned by carrier at owner's expense to shipping point earning charges both ways. Quarantine expenses of whatever nature or kind upon or in respect to property shall be borne by the owners of the property or be a lien thereon. The carrier shall not be liable for loss or damage occasioned by fumigation or disinfection or other acts done or required by quarantine regulations or authorities even though the same may have been done by carrier's officers, agents, or employees, nor for detention, loss, or damage of any kind occasioned by quarantine or the enforcement thereof. No carrier shall be liable, except in case of negligence, for any mistake or inaccuracy in any information furnished by the carrier, its agents, or officers, as to quarantine laws or regulations. The shipper shall hold the carrier harmless from any expense they may incur, or damages they may be required to pay, by reason of the introduction of the property covered by this contract into any place against the quarantine laws or regulations in effect at such place.

CLAIMS PROCEDURE AND LIMITATIONS

Sec. 2. (a) No carrier is bound to transport and property by any particular schedule, vehicle, train or vessel or otherwise than with reasonable dispatch. Every carrier shall have the right in case of physical necessity to forward said property by any carrier or route between the point of shipment and the point of destination. In all cases not governed by law, where a lower value than actual value has been represented in writing by the shipper or has been agreed upon in writing as the released value of the property as determined by the classification or tariffs upon which the rate is based, such lower value shall be the maximum amount to be recovered, whether or not such loss or damage occurs from negligence.

(b) As a condition precedent to recovery, claims must be filed in writing with the receiving or delivering carrier, or carrier issuing this bill of lading, or carrier in possession of the property when the loss, damage, injury or delay occurred, within nine months after delivery of the property (or in case of export traffic, within nine months after delivery at port of export), or in case of failure to make delivery, then within nine months after a reasonable time, for delivery has elapsed; and suits shall be instituted against any carrier not within two years and one day from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part thereof specified in the notice. Where claims are not filed or suits are not instituted thereon in accordance with the foregoing provisions, no carrier shall be liable on account of loss or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or on account of said property so far as this shall not avoid the payment or recovery of the consignee, consignor or a third party beneficiary, shall be in writing and shall be accompanied by original paid bill for transportation and original bill of lading, if not previously surrendered to carrier. Carrier may require certified or sworn statement of claim.

Sec. 3. Except where such service is required as the result of carrier's negligence, all property shall be subject to necessary coopersage, packing and repacking at owner's cost.

Sec. 4. (a) Property not received by the party entitled to receive it within the free time (if any) allowed by tariffs lawfully on file (such free time to be computed as therein provided) after notice of the arrival of the property at destination or at the point of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination, at the time tender of delivery of the property to the party entitled to receive it or at the address given for delivery has been made, may be kept in vehicle, warehouse or place of business of the carrier, subject to the tariff charge for storage and carrier's responsibility as warehouseman, only, or at the option of the carrier, may be removed to and stored in a warehouse at the point of delivery or at other available points, at the expense of the owner, and there held without liability on the part of the carrier, and subject to a lien for all transportation and other lawful charges, including a reasonable charge for storage. In the event the consignee can not be found at the address given for delivery, then in that event, notice of the placing of such goods in warehouse shall be left at the address given for delivery and mailed to any other address given on the bill of lading for notification, showing the warehouse in which such property has been placed, subject to the provisions of this paragraph.

(b) Where perishable property which has been transported to destination hereunder is refused by consignee or the party entitled to receive it upon tender of delivery, or said consignee or party entitled to receive it fails to receive it or claim within 15 days after notice of arrival of the property at destination shall have been duly sent or given, the carrier may sell the same at public auction to the highest bidder, at such place as may be designated by the carrier; provided, that the carrier shall have first mailed, sent, or given to the consignee notice that the property has been refused or remains unclaimed, as the case may be, and that it will be subject to sale under the terms of the bill of lading if disposition be not arranged for, and shall have published notice containing a description of the property, the name of the party to whom consigned, and the time and place of sale, once a week for two successive weeks, in a newspaper of general circulation at the place of sale or nearest place where such newspaper is published; provided, that 30 days shall have elapsed before publication of notice of sale after said notice that the property was refused or remains unclaimed was mailed, sent, or given.

(c) Where perishable property which has been transported to destination is refused by consignee or party entitled to receive it, or consignee or party entitled to receive it shall fail to receive it promptly, the carrier may, in its discretion, to prevent deterioration or further deterioration, sell the same to the best advantage at private or public sale; provided, that, if there be time for service of notification to the consignee or owner of the property or the failure to receive it and request for disposition of the property, such notification shall be given in such manner as the exercise of the diligence requires, before any property is sold.

(d) Where the procedure provided for in the two paragraphs last preceding is not possible, it is agreed that nothing contained in said paragraphs shall be construed to abridge the right of the carrier at its option to sell the property under such circumstances and in such manner as may be authorized by law.

(e) The proceeds of any sale made under this section shall be applied by the carrier to the payment of advances, tariff charges, packing, storage, and any other lawful charges and the expense of notice, advertisement, sale, and other necessary expense and of caring for and maintaining the property, if proper care of the same requires special expense, and should there be a balance it shall be paid to the owner of the property sold hereunder.

(f) Where the carrier is directed to load property from (or tender any services at) a place or places at which the consignor or his agent is not present, the property shall be at the risk of the owner before loading.

Where the carrier is directed to unload or deliver property (or render any services) at the place or places at which the consignee or its agent is not present, the property shall be at the risk of the owner after unloading or delivery.

ARTICLES OF EXTRAORDINARY VALUE, DOCUMENTS, SPECIE

Sec. 5. No Carrier hereunder will carry or be liable in any way for any documents, specie, or for any articles of extraordinary value not specifically rated in the published classifications or tariffs unless a special agreement to do so and a stipulated value of the articles are endorsed hereon.

Sec. 6. Explosives or dangerous goods will not be accepted for shipment. Every party whether principal or agents shipping such goods shall be liable for any indemnity the carrier against all loss or damage caused by such goods and carrier will not be liable for sale delivery of the shipment.

MOVER (CARRIER) WILL NOT RELINQUISH POSSESSION UNTIL ALL CHARGES ARE PAID

Sec. 7. The owner or consignee shall pay the advances, tariff charges, packing and storage, if any, and all other lawful charges on said property; but, except in those instances where it may lawfully be authorized to do so, no carrier shall deliver or relinquish possession at destination of the property covered by this bill of lading until all tariff rates and charges thereon have been paid. The consignor shall be liable for the advances, tariff charges, packing charges, storage and all other lawful charges, except that if the consignor stipulates, by signature in the space provided for that purpose on the face of this bill of lading that the carrier shall not make delivery without requiring payment of such charges and the carrier contrary to such stipulation, shall make delivery without requiring such payment, the consignor (except as hereinafter provided) shall not be liable for such charges. Provided, that, where the carrier has been instructed by the shipper or consignor to deliver said property to a consignee other than the shipper or consignor, such consignee shall not be legally liable for transportation charges in respect to the transportation of said property (beyond the those billed against him at the time of delivery for which he is otherwise liable) until the carrier has notified the delivering carrier in writing of the fact of such agency and absence of the carrier at the time of delivery of the name and address of the beneficial owner of said property; and in such cases the shipper or consignor, or, in the case of a shipment to a consignee or over to the consignee, the beneficial owner, shall be liable for such additional charges. If the consignee has given to the carrier erroneous information as to who the beneficial owner is, such consignee shall himself be liable for such additional charges. Nothing herein shall limit the right of the carrier to require, at time of shipment, the prepayment of the charges. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the advances or tariff charges must be paid upon the articles actually shipped.

Sec. 8. If this bill of lading is issued on the order of the shipper, or his agent, in exchange or in substitution for another bill of lading, the shipper's signature to the prior bill of lading as to the statement of value or otherwise, or election for common law or bill of lading liability, in or in connection with such prior bill of lading, shall be considered a part of this bill of lading as fully as if the same were written or made in or in connection with this bill of lading.

Sec. 9. Any alteration, addition or erasure in this bill of lading which shall be made without the special notation hereon of the agent of the carrier issuing this bill of lading shall be without effect, and this bill of lading shall be enforceable according to its original tenor.

ALL CLAIMS, DISPUTES, OR CONTROVERSIES ARE SUBJECT TO ARBITRATION

Sec. 10. Any controversy or claim arising out of or relating to this contract, the breach thereof, or the goods affected hereby, whether such claim be founded in tort or contract, shall be settled by arbitration under the Arbitration Law of the State of New York, and under the rules of the American Arbitration Association, provided however, that upon any such arbitration the arbitrator or arbitrators may not vary or modify any of the foregoing provisions.

NOTICE OF MOTION FOR CLASS ACTION DETERMINATION, AND SUMMARY
JUDGMENT AND SUPPORTING PAPERS

MESSAGE

FLAGG BROS. TRUCKING SERV., INC.
247 SO. FIFTH AVENUE - MOUNT VERNON, N. Y. 10550
Phone 668-9261

MESSAGE

REPLY

TO

Ms. Shirley Stone-Brooks

DATE

DATE

8/22/73

Dear Ms. Stone:

Your account has to be brought
up to date within 10 days of the date
of this letter (Sept. 1, 1973) or
your furn. will go up for sale.

It, (your storage payments) have to
be paid each month on the 1st and has
to be kept up or your furniture will
be sold. Your previous bal. from moving due

156.00

Storage for 7/73 & 8/73 150.00 75.00 a mo

SIGNED

Respectfully yours,

SIGNED Due

306.00

FORM AVAILABLE FROM GRAYBAR CO., INC.
692 THIRD AVE., 8 FLTH 22, N. Y.

THIS COPY FOR PERSON ADDRESSED

NOTICE OF MOTION FOR CLASS ACTION DETERMINATION, AND
SUMMARY JUDGMENT AND SUPPORTING PAPERS

FINAL NOTICE

FLAGG BROS. INC., MOVING and STORAGE
41 EAST 3rd ST. MT. VERNON, N.Y. 10550
Phone: (914) 668-9261 and (212) 324-5466

.....August 22.....1973

Shirley Brock Stone c/o M. Robinson

10 W. Cedar Ave.

Mt. Vernon, N.Y.

...Dear Ms. Stone...

Your Storage Account, amounting to \$..150.00..... is now
seriously overdue, and we herewith request that you make a payment on
same on or beforeSept. 1, 1973.....

Unless such payment is made we will be obliged to advertise your
goods for sale at public auction.

Thanking you for your immediate attention to this matter, we are

Very truly yours, H. Flagg, Pres.

(Read other side)

FLAGG BROS. INC., MOVING and STORAGE

NOTICE OF MOTION FOR CLASS ACTION DETERMINATION, AND
SUMMARY JUDGMENT AND SUPPORTING PAPERS.

40 E. Sidney Ave
Mt. Vernon NY 10550
Aug. 24, 1973

Slagg Brothers
41 & 3rd St.
Mount Vernon NY 10550

Dear Sirs

As per previous conversations via
telephone and being repetitious I
must say one last time.

I informed you of your prices
and how it was almost impossible
to pay.

When you came to my
apt. to put my furniture in
storage you informed me that
storage would be sixty five
dollars; after putting all my
furniture in your van one
of your employees informed
me of a new price as follows:
\$75.00/month storage.

75.00 for flatpacking and boxing
28.00 for submerging.

I gave a check for what I believed
at the time was for a
payment in full. The beginning
of the next week I wanted to

NOTICE OF MOTION FOR CLASS ACTION DETERMINATION, AND
SUMMARY JUDGMENT AND SUPPORTING PAPERS

knew how long this money would
be good for. Your secretary informed
me that I owed another \$956.00.

When asked why I was informed
that there were other things I had
to pay for boxes etc. Also I was
informed to come in. When I
came to the office the story again
was different from that of the
original and the second
conversation. I wanted to know
where my furniture was stored
and wanted to see it. I again
was informed there was a fee
of thirty five dollars to see. Also
my furniture was in Harrison.
Since then there has been numerous
telephone calls and still different
prices quoted.

I didn't wish to cause trouble
but you are making it very difficult
for me. As a last resort I'm letting
you know my intentions. You and I
both know your prices are atrocious
for storage etc. I have checked into
this area thoroughly and know you
do not charge by the hour for to pick
up and store furniture. This is
something which is done by the

NOTICE OF MOTION FOR CLASS ACTION DETERMINATION, AND
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Amount of public put.

It would be advisable for me to hear from you by return mail as to the amount of public put of furniture and also if you to do something price wise since the first amount you gave me was to be the pd in full am 3.00. You also changed the storage price from \$15 to \$75 and quoted to me when I came to Census office that "it's a shame you have to be a victim of circumstances even though it's our fault."

I expect an answer with in five days or/and I will have to take further action and have you investigated by the P.C. and/or the P.S.C.

Thanking you in advance for letting me know something by mail within five days

Yours Truly
Mr. J. Brooks

• NOTICE OF MOTION FOR CLASS ACTION DETERMINATION, AND
SUMMARY JUDGMENT AND SUPPORTING PAPERS

THE LEGAL AID SOCIETY OF WESTCHESTER COUNTY
56 GRAND STREET
WHITE PLAINS, NEW YORK 10601
(914) RO. 1-9200

August 23, 1973

Flagg Bros, Inc.
Moving & Storage
247 South 5th Ave.
Mt. Vernon, N. Y. 10550

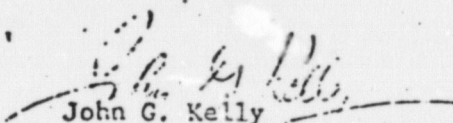
Re: Shirley Helliott (Shirley Brooks Stone)
120 North Kensico Ave.
White Plains, N. Y.
(Formerly 33 N. Third Ave.)
(Mt. Vernon, N. Y.)

Gentlemen:

Mrs. Stone has consulted me regarding charges being made for furniture which she has stored with you. As I understand, she was originally given a storage charge of \$75. a month as indicated by the enclosed copy of your "Combined Uniform Household Goods Bill of Lading and Freight Bill." However, she states that since June 13, 1973 the price seems to increase everyday and that the only explanation she has been able to obtain is something to the effect that you are sorry for the different prices, but you are just a victim of circumstances.

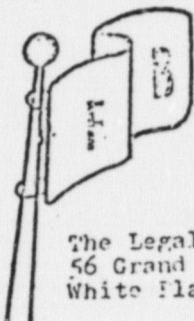
I would appreciate your explanation of this situation - looked at from the standpoint of dollars as well as from what you determine to be your legal rights in order that I may be able to advise her further.

Very truly yours,


John G. Kelly
Attorney

JGK/ea

NOTICE OF MOTION FOR CLASS ACTION DETERMINATION, AND
SUMMARY JUDGMENT AND SUPPORTING PAPERS



FLAGG BROS., INC. MOVING AND STORAGE

247 SOUTH 5th AVE. MOUNT VERNON, N. Y. 914 668-9261
212-324-5466

August 30, 1973

The Legal Aid Society of Westchester "County
56 Grand Street
White Plains, New York 10601

Re: Shirley Brooks Stone
120 N. Kensico Ave.
White Plains, N.Y.
Formerly 33 N. 3rd Ave.
Mt. Vernon, N.Y.

Dear Sir:

As we explain over the telephone, our rates are by the hour.
For one (1) truck, three (3) men, we get \$32.00 an hour plus $\frac{1}{2}$ travel
time. As far as your Bill of Lading is concerned, because of the
circumstances and the hardship we were concerned at the time, we
charged for 3 men and a truck for 6 hours @ \$28.00 an hour... \$168.00
plus $\frac{1}{2}$ hour travel time which was 14.00
She used 15 Barrels @ \$2.00 ea. 30.00
6 Book Ctns @ \$1.50 ea. 9.00
5 Matt. Ctns @ \$6.00 ea. 30.00
As standard procedure - Fumigating 8.00

I'm sorry we do not charge by cubic feet and as far as storage is
concerned, we charge by the containers which is \$25.00 per container
per month. Ms. Stone gave \$178.00 as a deposit which left a balance
due on the original bill of \$156.00.

Coming out of storage; you're charges again are by the hour for
one (1) truck, three (3) men, @ \$32.00 an hour. Charges coming out of
storage estimated to be 5 $\frac{1}{2}$ hours $\frac{1}{2}$ travel time @ \$32.00 an hour which
these charges brings a total of \$176.00
7/73, 8/73 Storage due 150.00
Balance from old bill 156.00
\$482.00

We must be paid in cash upon delivery before the furniture is un-
loaded from the truck.

Her storage bill is past due and must be brought up to date
immediately to avoid the sale of her furniture, or before we initiate
public auction proceedings.

Respectfully yours,

Henry Flagg
Henry Flagg, President

FLAGG BROS., INC. MOVING & STORAGE

HF/mgd

cc: Ms. Shirley Stone Brooks
"LARGE OR SMALL, WE MOVE THEM ALL"

NOTICE OF MOTION FOR CLASS ACTION DETERMINATION, AND SUMMARY
JUDGMENT AND SUPPORTING PAPERS

GEORGE WILSON PRINTING, INC., 135 SCHMITT BLVD., FARMINGDALE, N. Y. 11735

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NOTICE OF MOTION FOR CLASS ACTION DETERMINATION, AND
SUMMARY JUDGMENT AND SUPPORTING PAPERS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SHIRLEY HERRIOTT BROOKS, et al.,

Plaintiffs,

73 Civ. 4050 M.I.G.

-against-

FLAGG BROTHERS, INC., et al.,

Defendants.

AFFIDAVIT IN SUPPORT
OF MOTIONS FOR A
CLASS ACTION DETER-
MINATION AND SUMMARY
JUDGMENT

STATE OF NEW YORK)
COUNTY OF WESTCHESTER)SS:

GLORIA JONES, being duly sworn, deposes and

says that:

1. I am a citizen of the United States and of the State of New York. I am the plaintiff-intervenor in the above action. I have personal knowledge of all of the facts set forth herein. I make this affidavit in support of plaintiffs' and plaintiff-intervenor's motions for a class action determination and summary judgment.

2. I reside alone at 670 East Lincoln Avenue, Mount Vernon, New York. I am a recipient of public assistance.

3. In the fall of 1973, I resided at 353 Mundy Lane, Mount Vernon, New York. Pursuant to a judgment of eviction that had been entered against me in the City Court of Mount Vernon, and a warrant of eviction that had been issued against me by this Court, James A. Levister, City Marshal of the City of Mount Vernon, appeared on November 26, 1973, to remove my possessions and me from my apartment.

NOTICE OF MOTION FOR CLASS ACTION DETERMINATION, AND
SUMMARY JUDGMENT AND SUPPORTING PAPERS

4. When City Marshal James A. Levister appeared on November 26, 1973, at my apartment to remove my possessions and me, I tried without success to contact a caseworker at the Westchester County Department of Social Services to obtain advice as to whom I should call to store my furniture and other household possessions. City Marshal Levister informed me that I could not get anyone to store my furniture and other possessions and that the man with him, an employee of defendant Flagg Brothers, Inc., was the man who would store my goods. Employees of defendant Flagg Brothers then loaded my household goods and furniture on a truck owned by Flagg Brothers and proceeded to store them in a Flagg Brothers warehouse.

5. I did not on November 26, 1973, and at no time thereafter, authorize defendant Flagg Brothers, Inc., to store my furniture and household possessions, either by written or oral contract, or otherwise. I was not advised of the rate I would have to pay for the storage of my goods.

6. After I was evicted from my apartment at 353 Mundy Lane, Mount Vernon, New York, I moved into my daughter's apartment at 616 East Lincoln Avenue, Mount Vernon, New York, and thereafter into my son's house at 220 South 9th Avenue, Mount Vernon, New York. I now reside by myself in an apartment at 670 East Lincoln Avenue, Mount Vernon, New York.

7. In March, 1974, I contacted defendant Flagg Brothers and was informed by an employee of Flagg Brothers that I would have to pay Flagg Brothers the sum of Six Hundred Dollars in order to acquire my household goods. I was informed by this employee that, if I had not contacted Flagg Brothers at that time, my goods would have been sold immediately thereafter. I

NOTICE OF MOTION FOR CLASS ACTION DETERMINATION, AND
SUMMARY JUDGMENT AND SUPPORTING PAPERS

had never been previously notified that such a sale would take place.

8. I subsequently complained to defendants that the price they charged to move and store my goods was unreasonable, and that I had not contracted to pay Flagg Brothers any sum for the storage of my goods. Thereupon, an employee of defendant Flagg Brothers gave me a written notification that my bill was actually only Five Hundred Dollars, and that if I arranged to move my goods from Flagg Brothers' warehouse by my own means my bill would be reduced to Three Hundred Thirty-five Dollars. A copy of this notice is annexed hereto as Exhibit "A". I was then informed by an employee of defendant Flagg Brothers that if I were unable to pay the entire bill by approximately April 12, 1974, my stored goods would be sold. I believe that I did not owe the amount defendants sought to charge me.

9. All of my furniture and household goods are presently in Flagg Brothers' warehouse. I have had to reside without them since November 26, 1973. A copy of a list of these goods is annexed hereto as Exhibit "B".

10. The deprivation of my furniture and other household goods has caused me substantial and irreparable injury in that:

a) As a result of the strain caused by being without furniture, I suffered a nervous breakdown, for which I was hospitalized, and continue to suffer from extreme nervousness;

b) I have not invited any friends into my home because of my embarrassment at having no furniture;

NOTICE OF MOTION FOR CLASS ACTION DETERMINATION, AND
SUMMARY JUDGMENT AND SUPPORTING PAPERS

c) I have purchased fabric and other materials in order to make clothes to replace several of the articles of clothing that are being stored by defendants;

d) For several months after defendants took my furniture, I slept in one bed with my daughters' two children, ages 3 and 6, and thereafter with my son's two children, ages 2 and 7.

e) Since November 26, 1973, I have had to live without most of my furniture, clothing and other possessions.

11. After my motion to intervene was filed in this action, my attorney received a letter dated May 21, 1974, from counsel for defendant Flagg Brothers. This letter states in relevant part:

"Flagg Brothers, Inc. advises me that Mrs. Jones owes storage rental from January 1 through May 31 at the rate of \$75.00 a month plus \$35.00 auctioneer's fees or a total of \$410.00.

Mrs. Jones has been on notice since December 13, 1973 by letter of that date from the Social Services Department of Westchester County that it would not pay for her storage beyond one month.

It is the position of Flagg Brothers, Inc. that the above charges should be paid upon release of the storage lot."

A copy of this letter is annexed hereto as Exhibit "C".

12. On June 5, 1974, an agreement was reached between my counsel and counsel for defendant Flagg whereby I would obtain my goods from defendant Flagg upon payment of \$410.00. A copy of the letter dated June 5, 1974, from my attorney to counsel for defendant Flagg reflecting this agreement is annexed hereto as Exhibit "D".

NOTICE OF MOTION FOR CLASS ACTION DETERMINATION, AND
SUMMARY JUDGMENT AND SUPPORTING PAPERS

13. By letter from defendant Flagg's counsel to my counsel dated June 28, 1974, defendant Flagg repudiated the agreement in the letter of June 5, 1974. This letter states in part that "any understanding we entered into must be considered nullified. Mr. Flagg will take whatever steps he deems necessary to protect his interests." Although the attorney for Flagg Brothers alleges in the letter that on three occasions I arranged with Mr. Flagg to pick up my goods on a day certain, I in fact never made any such arrangements. A copy of the letter of June 28, 1974, is annexed hereto as Exhibit "E".

WHEREFORE, I respectfully pray that this Court grant plaintiffs' motions for a class action determination and summary judgment.

Gloria Jones
GLORIA JONES

Sworn to before me this
1 day of August, 1974.

Mary M. La Verde Ferraro
Notary public

MARY M. LA VERDE FERRARO
NOTARY PUBLIC, State of New York
No. 00 0000000
Qualified in Westchester County
Term Expires March 30, 1976

NOTICE OF MOTION FOR CLASS ACTION DETERMINATION, AND
SUMMARY JUDGMENT AND SUPPORTING PAPERS

If the p/u charges:

ARE:

75.00	—	platform fee
35.00	—	Legal Fees
225.00	—	Storage Dues
<u>335.00</u>		

If Flag Rises. Moves Year

165.00	—	moving cost
35.00	—	Legal Fees
75.00	—	platform
325.00	—	Storage
<u>450.00</u>		

NOTICE OF MOTION FOR CLASS ACTION DETERMINATION, AND
SUMMARY JUDGMENT AND SUPPORTING PAPERS

1. 2 Full size beds
2. 2 long dressers
3. Dining room table
and 6 chairs
4. Hutch
5. 3 piece Wicker Chair set
6. 2 mirrors
7. 2 end tables
8. Gas stove
9. Refrigerator
10. Cabinet for dishes
11. Clothes
12. Lamps
13. Carpet
- Other goods

NOTICE OF MOTION FOR CLASS ACTION DETERMINATION, AND SUMMARY
JUDGMENT AND SUPPORTING PAPERS

DAVID BRODSKY
JACOB S. LINETT
ALVIN ALTMAN
ROY L. ZISSER
MARTIN DAVID SCHECHTER
MICHAEL J. BARNAS

Brodsky, Linett and Altman
Counselors at Law
1770 Broadway
New York, N.Y. 10019

12121 CIRCLE 8-7700

EDITH L. FISCH
COUNSEL

ROBERT J. GALLAGHER
NOT MEMBER NEW YORK BAR

May 21, 1974

The Legal Aid Society of Westchester County
Mount Vernon Branch Office
City Hall - Roosevelt Square
Mount Vernon, New York 10550

Attention: Lawrence S. Kahn, Esq.

Re: Gloria Jones

v
Flagg Brothers, Inc., et al.

Dear Mr. Kahn:

This is in response to your letter dated May 16, 1974.

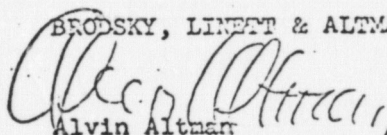
Flagg Brothers, Inc. advises me that Mrs. Jones owes storage rental from January 1 through May 31 at the rate of \$75.00 a month plus \$35.00 auctioneer's fees or a total of \$410.00.

Mrs. Jones has been on notice since December 13, 1973 by letter of that date from the Social Services Department of Westchester County that it would not pay for her storage beyond one month.

It is the position of Flagg Brothers, Inc. that the above charges should be paid upon release of the storage lot.

Very truly yours,

BRODSKY, LINETT & ALTMAN


Alvin Altman

AA:sf

cc: Flagg Brothers, Inc.

NOTICE OF MOTION FOR CLASS ACTION DETERMINATION, AND SUMMARY.

JUDGMENT AND SUPPORTING PAPERS

THE LEGAL AND SOCIETY OF WESTCHESTER COUNTY

MOUNT VERNON BRANCH OFFICE
CITY HALL - ROOSEVELT SQUARE
MOUNT VERNON, NEW YORK 10550

(914) 666-4045

June 5th, 1974

Brodsky, Linett & Altman
Counselors at Law
1776 Broadway
New York, New York 10019

Attention: Alvin Altman, Esq.

Re: Gloria Jones v. Flagg Brothers, Inc.

Dear Mr. Altman:

This is to confirm that, pursuant to your letter of May 21st and our telephone conversations of May 29th, 30th, 31st and June 3rd, Gloria Jones is paying Flagg Brothers, Inc., the sum of Four Hundred Ten Dollars (\$410.00) in order to obtain the release of her household goods presently being stored by Flagg Brothers. Payment of this money is being made solely in order to obtain possession of those goods and in no way constitutes an admission that the sum being paid is the sum due. Payment is made under protest and is without prejudice to any claims Mrs. Jones may have against Flagg Brothers, Inc., its officers and its employees, including, but not limited to, those claims asserted in her proposed intervenor's complaint, filed with her motion to intervene in Brooks v. Flagg Brothers, Inc., 73 Civ. 4050 (S.D. N.Y.).

Very truly yours,

Lawrence S. Kahn

LAWRENCE S. KAHN
Attorney at Law

LSK:ksj

NOTICE OF MOTION FOR CLASS ACTION DETERMINATION, AND
SUMMARY JUDGMENT AND SUPPORTING PAPERS

DAVID BRODSKY
JACOB S. LINETT
ALVIN ALTMAN
ROY L. ZISSER
MARTIN DAVID SCHECHTER
MICHAEL J. BARNAS

RECEIVED
JUL 1 1974

LEGAL AID SOCIETY
MOUNT VERNON, N.Y.

Brodsky, Linett and Altman
Counselors at Law
1770 Broadway
New York, N.Y. 10019

(212) 696-7700

EDITH L. FISCH
COUNSEL

ROBERT J. GALLAGHER
(NOT MEMBER NEW YORK BAR)

June 28, 1974

The Legal Aid Society of Westchester County
Mount Vernon Branch Office
City Hall - Roosevelt Square
Mount Vernon, New York 10550

Attention: Lawrence S. Kahn, Esq.

Re: Jones v Flagg

Dear Mr. Kahn:

We have attempted to cooperate with you in releasing your above-named client's furnishings to her based upon an understanding which you and I reached and presumably was agreed to by her.

Notwithstanding your good intentions, I must advise you that her good faith is open to serious question. During the course of the last month on three occasions she arranged with Mr. Flagg to have her goods picked up on a day certain. The removal of her goods from storage to platform from which point they are placed in a truck requires the use of labor and consequent expense. On each of the aforementioned three occasions, the last one being yesterday, June 27, 1974, Mrs. Jones failed to appear. This necessitated double labor in returning the goods to the warehouse.

In light of the above, any understanding we entered into must be considered nullified. Mr. Flagg will take whatever steps he deems necessary to protect his interests.

Very truly yours,

BRODSKY, LINETT & ALTMAN

Alvin Altman

AA:sf

cc: Mr. Henry Flagg

NOTICE OF MOTION FOR CLASS ACTION DETERMINATION, AND SUMMARY
JUDGMENT AND SUPPORTING PAPERS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
SHIRLEY HERRIOTT BROOKS, et al.,

Plaintiffs,

- against -

FLAGG BROTHERS, INC., et al.,

Defendants.
-----X

73 Civ. 4050 M.I.G.

STATEMENT PURSUANT
TO RULE 9 G

Pursuant to Rule 9-G of the General Rules of this Court,
plaintiffs submit the following as the material facts as to which
there is no dispute.

A. Plaintiff Brooks

1. Plaintiff Shirley Herriott Brooks is a citizen of the
United States and of the State of New York, and resides at
120 North Kensico Avenue, White Plains, New York, with her three
minor children, George Jr., Tonya and Michael.

2. Defendant Flagg Brothers, Inc. is a corporation
organized under the laws of the State of New York and is engaged
in the business of moving and storage in the State of New York.
Defendant Flagg Brothers, Inc. maintains an office and is engaged
in business at 247 South Fifth Avenue, Mount Vernon, New York.
Defendant Henry Flagg is President of Defendant Flagg Brothers,
Inc.

3. In the Spring of 1973, Plaintiff Brooks and her family
were residing at 33 North Avenue, Mount Vernon, New York.
Plaintiff's landlord had obtained an order of eviction against
her and on June 13, 1973, James A. Levister, the City Marshal of
the City of Mount Vernon, New York, appeared at her residence

NOTICE OF MOTION FOR CLASS ACTION DETERMINATION, AND
SUMMARY JUDGMENT AND SUPPORTING PAPERS

to dispossess Plaintiff Brooks and her family from their residence.

4. Plaintiff Brooks informed Mr. Levister at that time that she wanted to call someone to store her furniture and other household possessions. Mr. Levister informed Plaintiff Brooks that she would not be able to get anyone to store her furniture and that there was a man with him, Defendant Flagg, who would store her furniture. Plaintiff Brooks was led to believe by Mr. Levister's comments that she had no choice but to let Defendant Flagg store her goods.

5. Plaintiff Brooks then asked Defendant Flagg how much it would cost to move and store her goods. Defendant Flagg informed Plaintiff Brooks that she would have to pay \$65.00 per month for the moving and storage of the furniture. Plaintiff Brooks told Defendant Flagg that this sounded like a high price, but as Plaintiff Brooks believed that she had no choice in the matter, she told Defendant Flagg to proceed with the moving and storage of her furniture and household possessions.

6. After Plaintiff Brooks' goods were loaded on one of the Defendant Flagg Brothers' trucks, one of Defendant Flagg Brothers' moving men told Plaintiff Brooks that she would have to pay \$173.00. Plaintiff Brooks protested, since she had been told that \$65.00 was the entire cost. The moving man explained to Plaintiff Brooks that \$75.00 per month was for storage, \$75.00 was for barrelling and platforming, and \$28.00 was for fumigating. Plaintiff Brooks then asked whether she had to have fumigating and the moving man responded that fumigating was required. Plaintiff Brooks felt then that she had no choice in the matter but to pay and after first insisting on payment in cash,

NOTICE OF MOTION FOR CLASS ACTION DETERMINATION, AND
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Defendant Flagg agreed to accept Plaintiff Brooks' check for \$178.00.

7. After Plaintiff Brooks and her family were evicted, they moved into Plaintiff's cousin's apartment at 120 North Kensico Avenue, White Plains, New York.

8. On or about June 15, 1973, Plaintiff Brooks called Defendant Flagg Brothers in order to find out how long they would store her goods for the \$178.00 payment previously made. An employee of Defendant Flagg Brothers informed Plaintiff that she owed Defendant Flagg Brothers an additional sum of \$156.00.

9. On or about June 19, 1973, Plaintiff Brooks went to Defendant Flagg Brothers' office in Mount Vernon, New York. Plaintiff was there given a "Combined Uniform Household Goods Bill of Lading and Freight Bill" indicating that Defendant Flagg Brothers regarded the \$178.00 payment as a "deposit" and that there was a "balance due" of \$156.00. A copy of this Bill of Lading and Freight Bill is annexed to the Complaint and Plaintiff Brooks' Affidavit as Exhibit "A". Plaintiff informed Defendant Flagg that his prices were unreasonable and that she couldn't afford to pay them. Defendant Flagg informed Plaintiff that on the first day of July, 1973, Plaintiff would owe an additional \$75.00 for storage for the month of July. Plaintiff told Defendant Flagg that her one month's storage payment of June 13, 1973, should run to July 13, 1973. Defendant Flagg informed Plaintiff that storage charges are incurred on a "per month" basis, and that even if her goods had been stored on June 29, 1973, an additional \$75.00 would be due by July 1, 1973.

NOTICE OF MOTION FOR CLASS ACTION DETERMINATION, AND
SUMMARY JUDGMENT AND SUPPORTING PAPERS

10. On or about June 29, 1973, Plaintiff Brooks telephoned Defendant Henry Flagg. During the course of the conversation, Defendant Flagg offered to let Plaintiff remove her goods by July 13, 1973, if she would pay the balance of the original bill allegedly then due in the amount of \$156.00, plus \$45.00. Plaintiff restated her position to Defendant Flagg that her original payment should cover the storage of the goods from June 13, 1973, to July 13, 1973. Furthermore, Plaintiff was unable to remove her goods by July 13, 1973, because she was still sharing an apartment with her cousin and there was insufficient space in the apartment for her belongings.

11. Approximately one week later, in early July, 1973, Plaintiff Brooks again telephoned Defendant Henry Flagg, this time to arrange for a delivery date for her goods. Mr. Flagg's secretary gave her a date of August 14, 1973, and told her that she could obtain her possessions only if she paid \$484.00 in cash. Plaintiff was told that this amount included the past balance allegedly due. Plaintiff then spoke to Defendant Flagg and was told by him that payment has to be in cash and that checks or money orders would not be accepted.

12. On or about August 25, 1973, Plaintiff Brooks received a letter dated August 22, 1973, from Defendant Flagg Brothers stating:

"Your account has to be brought up to date within 10 days of the date of this letter (Sept. 1, 1973) or your furn. will go up for sale. It, (your storage payments) have to be paid each month on the 1st and has to be kept up or your furniture will be sold. Your previous bal. from Moving due \$156.00 Storage for 7/73 & 8/73 \$150.00 at \$75.00 a month
Total bal. \$306.00"

NOTICE OF MOTION FOR CLASS ACTION DETERMINATION, AND
SUMMARY JUDGMENT AND SUPPORTING PAPERS

A copy of this letter is annexed to the Complaint and to the Affidavit of Plaintiff Brooks as Exhibit "B". Accompanying this letter from Defendant Flagg Brothers was a "Final Notice" noted August 22, 1973, informing her that unless payment on the storage account was made, defendant Flagg Brothers would advertise her goods for public auction. A copy of this Notice has been annexed to the Complaint and to Plaintiff's Affidavit as Exhibit "C".

13. On August 24, 1973, Plaintiff Brooks wrote to Defendant Flagg Brothers detailing her position and claims regarding Defendant Flagg's billing computations and methods. A copy of this letter is annexed to the Complaint and to Plaintiff's Affidavit as Exhibit "D".

14. On August 23, 1973, Plaintiff Brooks' attorney wrote to Defendant Flagg Brothers contesting Defendant Flagg Brothers' constant change in warehouse fees allegedly due. A copy of this letter is annexed to the Complaint and to Plaintiff's Affidavit as Exhibit "E". Defendant Flagg's letter dated August 30, 1973, in response to Plaintiff Brooks' letter states in part: "Her storage bill is past due and must be brought up to date immediately to avoid the sale of her furniture, or before we initiate public auction proceedings." A copy of this letter is annexed to plaintiff's affidavit as Exhibit "F".

15. All of plaintiff Brooks' stored goods consisted of essential items of household furniture. A list of these goods contained in "Household Goods Descriptive Inventory" prepared by defendant Flagg is annexed to Plaintiff's affidavit as Exhibit "G". Defendant Flagg Brothers retained plaintiff Brooks' goods from June 13, 1973, until January 24, 1974, causing plaintiff and

• NOTICE OF MOTION FOR CLASS ACTION DETERMINATION, AND
SUMMARY JUDGMENT AND SUPPORTING PAPERS

her children to reside without the use of these goods, and causing them hardship and injury.

16. On September 21, 1973, plaintiff's attorney instituted this action for declaratory and injunctive relief and for damages against Defendants Henry Flagg and Flagg Brothers, Inc., and James A. Levister, City Marshal of the City of Mount Vernon, New York. By stipulation between Plaintiff's attorney and the attorney for Defendants Flagg and Flagg Brothers, Inc., it was agreed that no storage charge would accrue or be imposed upon Plaintiff Brooks by reason of the storage of her goods with the Defendants from November 5, 1973 to January 5, 1974, inclusive.

17. On January 24, 1974, pursuant to an agreement made between Plaintiff's attorneys and the attorneys for Defendants Flagg and Flagg Brothers, Inc., Plaintiff was permitted to and did remove all her goods from the Defendant's warehouse.

B. Plaintiff-Intervenor Jones

18. Plaintiff Gloria Jones is a citizen of the United States and of the State of New York. Plaintiff Jones resides alone at 670 East Lincoln Avenue, Mount Vernon, New York. Plaintiff is a recipient of public assistance.

19. In the Fall of 1973, plaintiff resided at 353 Mundy Lane, Mount Vernon, New York. Pursuant to a judgment of eviction that had been entered against plaintiff by the City Court of Mount Vernon, and a warrant of eviction that had been issued by said court, James A. Levister, City Marshal of the City of Mount Vernon, appeared on November 26, 1973, to remove plaintiff and her possessions from her apartment.

NOTICE OF MOTION FOR CLASS ACTION DETERMINATION, AND SUMMARY
JUDGMENT AND SUPPORTING PAPERS

20. When City Marshal James A. Levister appeared on November 26, 1973, to remove plaintiff and her possessions from her apartment, plaintiff unsuccessfully attempted to contact a caseworker at the Westchester County Department of Social Services to obtain advice as to whom she should call to store her furniture and other household possessions. Marshal Levister then informed plaintiff that she could not get anyone to store her furniture and other possessions and that the man with him, an employee of defendant Flagg Brothers, Inc., was the man who would store her goods. Employees of defendant Flagg Brothers then loaded plaintiff's goods on a truck owned by Flagg Brothers and proceeded to store them in a Flagg Brothers warehouse.

21. Plaintiff did not on November 26, 1973, and has never since authorized defendant Flagg Brothers, Inc., to store her furniture and household possessions, either by written or oral contract, or otherwise.

22. Plaintiff was never advised of the rate that she would have to pay for the storage of her household goods.

23. After plaintiff was evicted, she moved into an apartment at 670 East Lincoln Avenue, Mount Vernon, New York.

24. In March of 1974, plaintiff contacted defendant Flagg Brothers and was informed by an employee of Flagg Brothers that plaintiff would have to pay Flagg Brothers the sum of Six Hundred Dollars in order to acquire her household goods. Plaintiff was informed by this employee that if she had not contacted Flagg Brothers at that time, the goods would have been sold immediately thereafter. Plaintiff had never previously been notified that such a sale would take place.

NOTICE OF MOTION FOR CLASS ACTION DETERMINATION, AND
SUMMARY JUDGMENT AND SUPPORTING PAPERS

25. Subsequently, plaintiff complained to defendants that the price they had charged her was unreasonable, and that she had not contracted to pay defendants any sum for storage of her household goods. Thereupon, defendants notified plaintiff that her bill was actually only Five Hundred Dollars, and that if she arranged to move her goods from defendants' warehouse by her own means the bill would be further reduced to Three Hundred Thirty-five Dollars. A copy of this notice is annexed to plaintiff Jones' affidavit as Exhibit "A". Plaintiff was informed that if she was unable to pay the entire bill by approximately April 12, 1974, her stored goods would be sold. Plaintiff believed that she did not owe defendants the amount they were charging her.

26. All of plaintiff's furniture and household goods are presently in defendant Flagg Brothers warehouse. Defendants continued retention of plaintiff's goods, all of which are essential items of household furniture, and the imposition of the statutory lien pursuant to New York Uniform Commercial Code §7-209 have resulted in plaintiff and her family having to reside without these items, thereby causing plaintiff and her family grave and irreparable harm. A list of these goods are annexed to plaintiff Jones' affidavit as Exhibit "B".

27. After plaintiff Jones filed her motion to intervene in this action, plaintiff Jones' counsel received a letter dated May 21, 1974, from counsel for defendant Flagg Brothers. This letter states in relevant part:

"Flagg Brothers, Inc. advises me that Mrs. Jones owes storage rental from January 1 through May 31 at the rate of \$75.00 a month plus \$35.00 auctioneer's fees or a total of \$410.00.

NOTICE OF MOTION FOR CLASS ACTION DETERMINATION, AND
SUMMARY JUDGMENT AND SUPPORTING PAPERS

Mrs. Jones has been on notice since December 13, 1973 by letter of that date from the Social Services Department of Westchester County that it would not pay for her storage beyond one month.

It is the position of Flagg Brothers, Inc. that the above charges should be paid upon release of the storage lot."

A copy of this letter is annexed to plaintiff Jones' affidavit as Exhibit "C".

28. On June 5, 1974, an agreement was reached between counsel for Jones and counsel for Flagg Brothers providing for the release of Jones' goods upon Jones' payment of \$410.00. A copy of the letter dated June 5, 1974, from my attorney to counsel for defendant Flagg is annexed to Jones' affidavit as Exhibit "D".

29. By letter from defendant Flagg's counsel to plaintiff Jones' counsel dated June 28, 1974, defendant Flagg repudiated the agreement in the letter of June 5, 1974. A copy of the letter of June 28, 1974, is annexed to Jones' affidavit as Exhibit "E".

Respectfully submitted,

THE LEGAL AID SOCIETY OF WEST-
CHESTER COUNTY

By: Martin A. Schwartz, of Counsel
Lawrence S. Kahn, of Counsel
Attorneys for Plaintiffs and
Plaintiff-Intervenor
Office and P. O. Address:
56 Grand Street
White Plains, New York 10601
Tel. (914) 761-9200

NOTICE OF MOTION FOR CLASS ACTION DETERMINATION, AND
SUMMARY JUDGMENT AND SUPPORTING PAPERS

an attorney admitted to practice in the courts of New York State,

certifies that the within
has been compared by the undersigned with the original and found to be a true and complete copy
shows: deponent is

Affidavit of Service by Mail.
Affirmation of Service by Mail on Reverse Side.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

COPYRIGHT 1965 BY JULIUS BLUMBERG, INC., LAW BLANK PUBLISHERS
80 EXCHANGE PLACE AT BROADWAY, NEW YORK

C 321-Affidavit of Service by Mail.
Affirmation of Service by Mail on Reverse Side.

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80 EXCHANGE PLACE AT BROADWAY, NEW YORK

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SHIRLEY HERRIOTT BROOKS, et al.

Plaintiff

against

FLAGG BROTHERS, INC., et al.

Defendant

73 Civ. 4050 MIG

AFFIDAVIT OF SERVICE
BY MAIL

STATE OF NEW YORK, COUNTY OF WESTCHESTER

ss.:

The undersigned being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age and resides at
White Plains, New York

That on the 26th day of August 1974 deponent served the annexed
Motion for Class Action and Summary Judgment
on Arnold H. Shaw & Norman Weiss,
attorney(s) for Defendants
in this action at 51 Madison Ave., New York, N.Y. * 2 West 45th St., New York, N.Y.
the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed
in a postpaid properly addressed wrapper, in ~~the office~~ official depository under the exclusive care
and custody of the United States post office department within the State of New York.

Sworn to before me

this 26th day of August

19 74

Marie Reilly

MARTIN A. SCHWARTZ
Notary Public, State of New York
No. 03-355455
Qualified in Bronx County
Certificate filed in New York County
Commission Expires March 30, 1975

herein, by delivering a true copy thereof to h personally. Deponent knew the
person so served to be the person mentioned and described in said papers as the therein.

Sworn to before me on

19

The name signed must be printed beneath

AFFIDAVIT IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

*Rec'd
mail
Oct 5, 74*

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SHIRLEY HERRIOTT BROOKS, et al.,

Plaintiffs,

v.

FLAGG BROTHERS, INC., et al.,

Defendants.

and

THE ATTORNEY GENERAL OF THE STATE
OF NEW YORK, et al.,

Defendant-Intervenors.

73 Civ. 4050

AFFIDAVIT IN OPPOSITION
TO MOTION FOR SUMMARY
JUDGMENT

STATE OF ILLINOIS)

COUNTY OF COOK)

SS

DONALD E. HORTON, being duly sworn, deposes and says
that:

1. I am the President of the American Warehousemen's Association (AWA). I have served as Chief Administrative Officer of the Association since May 1, 1954. As President of AWA, I am responsible for the administration of the various activities of the Association which include, but are not limited to, educational programs for the industry, maintenance of library and reference sources dealing with all phases of physical distribution, handling of industry-customer relations, and industry-government relations. I serve subject to policies set forth by the Association's Board of Directors, as the official spokesman for the industry as represented by the Association.

AFFIDAVIT IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT.

I have been associated with the merchandise warehousing industry in various capacities since 1940 and with the American Warehousemen's Association since 1946. During these years it has been possible for me to develop an intimate knowledge of the industry through close association with the principals of merchandise warehousing companies and their customers, through study of their methods and functions, through the gathering and dissemination of statistical data, and through the planning and conducting of seminars and training programs dealing with all aspects of the conduct of the merchandise warehousing business. I have served various Governmental agencies in an advisory capacity in warehousing matters, among these agencies being the Hoover Commission, Department of Defence, General Services Administration, and the Interstate Commerce Commission.

I am authorized by AWA to submit this Affidavit.

2. AWA, established in 1891, is a Not-For-Profit Corporation organized and existing under the laws of the State of Illinois, with principal offices at Chicago, Illinois. It is the only national trade association for the public merchandise warehousing industry. It has 478 members who operate warehouses throughout the United States. Of the AWA's 478 members, there are 18 members located in the State of New York. The member warehouses account for approximately 1,800,000,000 cubic feet of warehouse space which represents about 75% of all public merchandise warehouse space in the United States.

AFFIDAVIT IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

3. The merchandise warehouse industry provides storage and distribution services to industrial and commercial accounts. The types of commodities handled by these warehouses range from consumer goods, such as drugs, toiletries, foodstuffs, appliances, clothing, etc., to the storage of manufacturers' parts, machinery, chemicals, etc. They do not include the storage of used household goods for individuals.

4. One of the principal functions of merchandise warehousing is to provide storage and distribution services for manufacturers located throughout the country and in foreign countries. A typical merchandise warehouse will be storing a mix of products such as radios from Japan, television sets from Chicago, auto parts from Detroit, office machines from Boston, and a myriad of other products from various manufacturers.

A recent study by Professor Bernard J. La Londe of Ohio State University published by AWA in Warehousing Review, Vol. 2, No. 3, page 5 (May/June 1973), noted the following facts concerning the number of customers and product mix for the public merchandise warehousing industry:

AFFIDAVIT IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

NUMBER OF CUSTOMERS AND PRODUCTS STORED

Total Number of Customers

<u>Number of Customers</u>	<u>1967</u>	<u>1972</u>
10 & Under	11.1%	6.5%
11 - 50	40.8	41.3
51 - 100	25.9	23.9
101 - 250	22.2	23.9
Over 250	-	44
Total	100.0%	100.0%

<u>Products Stored</u>	<u>Finished Goods</u>		<u>Raw Materials</u>	
	<u>% of Respondents Handling Product</u>	<u>Space Devoted to Product</u>	<u>% of Res. Hand. Pro.</u>	<u>Sp.Devote. to Produc</u>
Grocery Products	86.1%	36.6%	13.9%	14.0%
Chemicals	70.9	14.5	21.5	37.6
Household Appliances	58.2	11.0	3.8	2.3
Machinery & Industrial Equipment	36.7	3.9	10.1	6.0
Automotive	35.4	5.7	5.1	12.0
Drugs & Health Supplies	32.9	2.8	1.3	1.2
Home Furnishings	26.6	2.6	3.8	2.9
Bldg Supplies/Hardware	24.1	2.2	6.3	2.9
Tobacco Products	20.3	3.5	-	-
Recreation Equipment	17.7	1.8	2.5	2.0
Alcoholic Beverages	13.9	1.3	-	-
Paper Products	12.6	4.7	3.8	12.4
School & Hospital	6.3	.7	1.3	1.2
Other	34.2	8.7	5.1	5.6
Total		100.0%		100.0%

PERCENT OF PRODUCT STORED WHICH IS FINISHED GOODS

<u>% Finished Goods</u>	<u>% Distribution of Responses</u>
100%	34.2%
75-99	31.5%
50-74	23.7%
25-49	6.6%
Under 25%	4.0%
Total	100.0%

Unweighted Average, Finished Goods: 78.2%
Unweighted Average, Raw Materials: 21.8%

AFFIDAVIT IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

Such goods will be stored under contract with the manufacturer, the distributor or the retailer. The warehouse will distribute such goods to stores, factories, and various other receivers in the territory surrounding the warehouse. In performing its function as a merchandise warehouse, it provides such services as break-bulk, consolidation, distribution of pool cars, cartage, packaging, repairing, sampling, weighing, provides export and import services, such as U. S. Custom Bonded Storage and numerous other functions related to the storage and distribution of commercial goods.

5. The warehouseman's lien is essential to the business of a merchandise warehouse. The warehouse is generally a small business when compared with the large, national corporations for which it stores merchandise. The 1967 U.S. Department of Commerce, Bureau of the Census, Census of Business, Public Warehousing, BC67-WS9, notes that there were 1,677 general warehouses in the United States. (This is the latest Census of Business report on warehousing). Of these 1,677 general warehouses, only 27 had 100 or more employees (Table 2). Only 200 of the 1,677 general warehouses earned annual gross revenues of \$500,000.00 or more (Table 3). Most of AWA's members are privately-owned companies which are actively managed by the owner who lives in the community where the warehouse is located. Many of the warehouses are located in smaller metropolitan areas. Of the 1,677 in the 1967 study, a total of 954 were located in areas with less than 1,000,000 in population (Table 13). Merchandise warehousing businesses with few exceptions, are locally-owned and locally-based small business companies who store the merchandise of major companies who are located throughout the United States and the world. The lien of the merchandise warehouseman upon the goods stored is essential if he

AFFIDAVIT IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

is to deal with such giant companies and their vast resources.

6. The merchandise warehouseman also deals with companies whose credit and reputation is unknown. These companies are located throughout the country and in foreign countries. The local warehouseman could not possibly check the credit standing and reliability of all of these customers. In dealing with manufacturers located at distant points, it must rely upon its lien.

7. Merchandise warehouses are used by manufacturers to permit them to expand into new markets. This is especially true of small, new companies who must gradually introduce their products into new markets. The lien allows the marketing of these products without the pre-payment of all distribution charges. It is in this manner that small producers are able to market in competition with large companies with established distribution systems. The warehousemen's lien protects the warehouseman when these new products or their producers fail. In some of these instances the depositors have completely disappeared and efforts to locate them have failed. In others they go bankrupt and the warehouseman's lien is a recognized preference which protection is essential in terms of the credit risks of dealing with companies at distant locations.

8. In using the merchandise warehouse as a distribution point, manufacturers maintain a steady flow of goods moving through the warehouse. The warehousemen's lien allows the warehouseman to perform essential services for the goods and to release them prior to payment for such services since the lien

AFFIDAVIT IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

Case Jones
is attaching to new goods of the customer that are entering the warehouse. To require the merchandise warehouse to deal with each lot of goods as a separate, distinct unit would either cause an unreasonable risk to be placed upon the warehouseman or it would force it into prepayment procedures that would diminish its value as a distribution center. The existence of the warehousemen's lien facilitates the free flow of goods through the warehouse.

9. Warehousemen not only furnish the numerous services which I previously mentioned, but they also expend their own funds on behalf of their customers. For example, they prepay freight charges for their customers or accept and pay for collect shipments. The lien protects them when they make such payments and the commercial value of such arrangements is important. In a modern economy, it is essential that goods move freely and quickly. Market prices fluctuate constantly and delays can cause serious problems in the buying and selling of goods. Retailers and manufacturers maintain minimum inventories, relying upon a pipeline of goods moving through the warehouse. The warehousemen's lien facilitates the free and easy movement of goods in commerce.

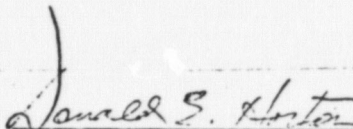
10. If the lien were held unconstitutional for merchandise warehouses, there would be increased costs and unnecessary delay in the movement of goods. The increased costs would be charged to the bailee and ultimately increase the price of goods.

11. I have read the preliminary statement contained in the Plaintiffs' Memorandum of Points and Authorities in Support of Motions for Class Action Determination and Summary Judgment and the supporting affidavits of Shirley Herriott Brooks and Gloria Jones. In my entire career in the merchandise warehousing industry, I have never known of a single instance involving a

AFFIDAVIT IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

merchandise warehouseman and depositor that even closely resembles the alleged factual circumstances in this case.

Indeed, the climate at the time of deposit of goods in a merchandise warehouse is completely foreign to the climate and circumstances alleged in this case. When goods are deposited in a merchandise warehouse by a manufacturing, distributing, or retailing firm, the deposit is invariably the result of prearrangement, negotiation of terms and charges, and a contractual understanding between depositor and warehouseman. In the event of a continuing business relationship, any changes in terms or charges are similarly the result of negotiation and contractual understanding.


DONALD E. HORTON

Subscribed and Sworn to before
me this 3rd day of October,
1974.


Notary Public

AFFIDAVIT IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SHIRLEY HERRIOTT BROOKS, et. al.,)

Plaintiffs,)

- against -)

FLAGG BROTHERS, INC., et.al.,)

Defendants,)

73 Civ. #050 M.I.G.

AFFIDAVIT IN OPPOSITION
TO MOTION FOR SUMMARY
JUDGMENT

and

THE ATTORNEY GENERAL OF
THE STATE OF NEW YORK, et.al.,

Defendant - intervenors

STATE OF MARYLAND)

) SS

COUNTY OF MONTGOMERY)

RICHARD M. POWELL, being duly sworn, deposes and says that:

1. I am the President of the International Association of Refrigerated Warehouses (IARW). I have held my present position for 16 years. As President of IARW, I am responsible for the planning, organization, staffing, directing, and controlling, subject to broad policy control by the Board of Directors. My knowledge of the industry is based on 16 years of close association with the public refrigerated warehousemen, with their warehousing operations, and with other segments of the food industry which do business with them. I am authorized by IARW to submit this Affidavit.

2. IARW is a Not-For-Profit Corporation organized and existing under the laws of the State of Delaware, with principal offices at Washington, D.C. It is an international trade association for the public refrigerated warehousing industry, having, in the United States, 218 member companies who operate 432 public refrigerated warehouses in all states, except Alaska, Montana, New Hampshire and Wyoming. Of the IARW's 218 U.S. member companies, there are 27 warehouses located in the State of New York. The member warehouses account for about 567,000,000 cubic feet of public

AFFIDAVIT IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

refrigerated warehouse space which comprise over 75% of the total public refrigerated warehouse space in the United States.

3. The public refrigerated warehouse industry provides storage and distribution services to manufacturers, processors and distributors of products requiring refrigeration. Typically, these products are mostly perishable foodstuffs, but they also embrace various commercial products which require refrigeration such as film, blood plasma, seeds, chemicals and plastics. The refrigerated warehouse provides freezing services as well as storage at a range of temperatures depending upon the nature of the product.

4. One of the principal functions of the public refrigerated warehouse is to provide economical distribution services for producers located throughout the country. Meat products from the Midwest, fruit and vegetables from Texas, fish from the Pacific Northwest, and a multitude of other products will be stored at a public refrigerated warehouse. The warehouse will distribute these products to stores, restaurants, institutions and other receivers in the territory surrounding the warehouse. The services accorded to such goods include break-bulk, consolidation, distribution of pool-cars, cartage, packaging, repairing, sampling, weighing, loading and unloading, and numerous other functions related to the economical storage and distribution of commercial goods.

5. The public refrigerated warehouse relies upon its lien as an essential contractual element in the conduct of its business. The local public refrigerated warehouse deals in a national market. It cannot be fully informed of the credit and status of businesses throughout the country, or, for that matter, the numerous foreign producers that store goods in commercial warehouses. In dealing with customers located in distant areas, it must rely upon the warehousemen's lien for its protection.

AFFIDAVIT IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

6. Producers rely upon public warehouses to permit them to expand into new markets. This is especially true of small, new producers who must introduce their products into new markets by making test sales. The warehousemen's lien protects the warehouseman when these new products or their producers fail. The lien, however, allows the marketing of these products without the prepayment of all distribution charges. It is in this manner that small producers are able to market in competition with large companies that may often own their own refrigerated warehouses.

7. The public refrigerated warehouse is typically a small, local privately owned company. The 1967 Census of Business, Public Warehousing, BC 67-WS9, published by the U.S. Department of Commerce, Bureau of the Census, (the most recent publication) indicates that of the 749 refrigerated warehouses then operating, a total of 432 were warehouses of less than 500,000 cubic feet capacity (Table 19). Of these 749 warehouses, only 182 were located in metropolitan areas of 1,000,000 inhabitants or more (Table 17). The remainder were located in smaller communities. In terms of the State of New York with a total of 89 refrigerated warehouses, 22 were located in New York, New York and 6 in Buffalo, New York (Table 1 and Table 17). The remaining 61 warehouses were located in the smaller communities in New York State. Of the 749 refrigerated warehouses, only 142 had annual gross revenues of over \$500,000.00 (Table 3). The refrigerated warehouse typically is a small, privately owned company who must deal with large, national corporations. These large food processors, meat packers, etc. have overwhelming resources and large staffs of lawyers and other experts. In disputes between the warehouseman and these large, national corporations, the lien is a vital protection for the warehouseman.

AFFIDAVIT IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

8. The nature of commercial warehousing is such that a steady flow of goods moves through the warehouse. The lien allows the warehouseman to perform essential services for the goods and to release them prior to payment for such services since the lien is attaching to new goods of the customer that are entering the warehouse. This is a far different situation from the household goods warehouse who receives a person's household goods, stores them and releases them when the charges are paid. The commercial warehouse does not and cannot deal economically with each lot of goods as a separate, distinct unit. It is the existence of the warehousemen's lien that allows the economic free flow of goods through the warehouse.

9. Refrigerated Warehousemen not only furnish the numerous services which I previously mentioned, but they also expend their own funds on behalf of their customers. For example, they pre-pay freight charges for their customers or accept and pay for collect shipments. The lien allows them to make such payments and the commercial value of such arrangements is important. A food broker in New Jersey may buy a carload of foodstuffs from Texas F.O.B. origin, consigned to a refrigerated warehouse in New York. The warehouse will pay the collect freight charges relying on its lien. Absent the existence of the lien, such commercial flexibility would be difficult. The same situation exists in ordering out goods from a warehouse. A broker receives an order for immediate shipment, telephones the warehouse to ship the freight pre-paid and the warehouse can do so relying for payment upon the lien it has on other of the broker's goods. When dealing with perishable foodstuffs items, it is essential that goods move freely and quickly. The risk of spoilage and deterioration is high. Market prices fluctuate constantly and delays can cause serious problems in the buying and selling of goods. The warehousemen's lien facilitates goods moving freely and easily in commerce.

AFFIDAVIT IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

10. There would be an adverse effect upon the nationwide marketing of foodstuffs items if the lien were held unconstitutional. It is impossible to calculate the increased cost that would result but it would be another cost that would be added to the price of food.

State of Maryland
County of Montgomery

Richard M. Powell
RICHARD M. POWELL

Subscribed & Sworn to before me this

30th day of September, 1974.

Elizabeth A. König
Notary Public
My Commission Expires July 1, 1978

Subscribed and sworn to before me this
day of September, 1974.

Rec'd
Oct 7, 1974

DEFENDANTS' NOTICE OF CROSS MOTION TO DISMISS COMPLAINT,
AND SUPPORTING PAPERS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
SHIRLEY HERRIOTT BROOKS, individually and on:
behalf of all others similarly situated,

Plaintiff,

and

GLORIA JONES,

Plaintiff-Intervenor,

- against -

FLAGG BROTHERS, INC., individually and as
representative of a class of all others
similarly situated, HENRY FLAGG, individu-
ally and as President of FLAGG BROTHERS,
INC.,

Defendants,

and

THE ATTORNEY GENERAL OF THE STATE OF
NEW YORK, AMERICAN WAREHOUSEMEN'S ASSOCI-
ATION, INTERNATIONAL ASSOCIATION OF RE-
FRIGERATED WAREHOUSES, INC., WARE-
HOUSEMEN'S ASSOCIATION OF THE PORT OF
NEW YORK, COLD STORAGE WAREHOUSEMEN'S
ASSOCIATION OF THE PORT OF NEW YORK,

Defendants-Intervenors.
-----X

73 CIV. 4050
H.F.W.

NOTICE OF CROSS
MOTION TO DISMISS
COMPLAINT

S I R S :

PLEASE TAKE NOTICE, that upon the annexed affidavits,
and the exhibits annexed thereto and upon all the papers
heretofore filed in this action, defendants FLAGG BROTHERS,
INC. and HENRY FLAGG, will cross move this Court at a
Motion Term to be held in Room 1603 of the U. S. Courthouse,
Foley Square, New York, New York on the 16th day of October,
1974 at 10:00 A. M., or as soon thereafter as counsel may
be heard for an order pursuant to Rule 12(b)(6) of the Federal
Rules dismissing the action for failure to state a claim


DEFENDANTS' NOTICE OF CROSS MOTION TO DISMISS COMPLAINT, AND
SUPPORTING PAPERS

upon which relief can be based.

The grounds of this motion as more fully set forth in the annexed affidavits and exhibits and in defendants' memorandum of points and authorities in support of the cross motion are that as a matter of law New York Uniform Commercial Code Sections 7-209 and 7-210 do not violate the due process clause of the 14th Amendment to the United States Constitution in authorizing imposition of a warehouseman's lien upon goods placed in storage and the enforcement of said lien in the event of default in payment of the storage charges and further that as a matter of law the requisite state action required under the 14th Amendment is lacking.

Dated: New York, New York
September 19, 1974

Respectfully submitted,


BRODSKY, LINETT & ALTMAN
Alvin Altman, of Counsel
Michael J. Barnas, of Counsel
Attorneys for Defendants
FLAGG BROTHERS, INC. and
HENRY FLAGG
Office & P. O. Address
1776 Broadway
New York, New York 10019
(212) 245-7700

DEFENDANTS' NOTICE OF MOTION TO DISMISS COMPLAINT, AND
SUPPORTING PAPERS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
SHIRLEY HERRIOTT BROOKS, individually
and on behalf of all others similarly
situated,

Plaintiffs,

and

GLORIA JONES,

Plaintiff-Intervenor,

- against -

FLAGG BROTHERS, INC., individually and
as representative of a class of all
others similarly situated, HENRY FLAGG,
individually and as President of Flagg
Brothers, Inc.,

Defendants,

and

THE ATTORNEY GENERAL OF THE STATE OF NEW
YORK; THE AMERICAN WAREHOUSEMEN'S ASSOCIA-
TION; THE INTERNATIONAL ASSOCIATION OF
REFRIGERATED WAREHOUSES, INC.; THE WARE-
HOUSEMEN'S ASSOCIATION OF THE PORT OF NEW
YORK; and THE COLD STORAGE WAREHOUSEMEN'S
ASSOCIATION OF THE PORT OF NEW YORK,

Defendant-Intervenors.

-----X
STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

HENRY FLAGG, being duly sworn, deposes and says:

1. I am a defendant in the above action and President
of the corporate defendant FLAGG BROTHERS, INC. I have
personal knowledge of all of the facts and circumstances re-
cited herein. I submit this Affidavit in opposition to
plaintiffs' motion for summary judgment and in support of a

DEFENDANTS' NOTICE OF CROSS MOTION TO DISMISS COMPLAINT, AND
SUPPORTING PAPERS

cross motion for dismissal of the complaints for failure to state a claim upon which relief can be granted.

2. Defendant FLAGG BROTHERS, INC. is a New York corporation engaged in the business of household moving and storage. It maintains an office and place of business at 174 West Lincoln Avenue, Mount Vernon, New York. It holds Certificate No. NYC 826 issued by the Department of Transportation of the State of New York.

AS TO BROOKS CLAIM

3. On June 13, 1974 I was requested by James A. Levister, City Marshall of the City of Mount Vernon to accompany him to 33 North Third Avenue, Mount Vernon, New York for the purpose of making arrangements to remove the belongings of SHIRLEY BROOKS, the plaintiff herein, from her apartment in the said building to the sidewalk in front of said building. The plaintiff BROOKS was being evicted from her apartment pursuant to a court order. My initial objective in visiting the apartment at that time was to determine the manpower needs for and the time of the actual removal of plaintiff's goods from the apartment to the sidewalk. In doing so, I was acting solely on behalf of the landlord through the Marshall.

4. On the date and time above specified in my presence the plaintiff BROOKS advised the City Marshall that she could not satisfy the judgment and accordingly the Marshall instructed the defendant FLAGG BROTHERS, INC. to proceed with the removal. My sole function at that time was at the direction of the City Marshall to act for the owner of the premises in effecting the removal of the plaintiff's belongings from her apartment to the sidewalk. That was the sum and substance of my job.

DEFENDANTS' NOTICE OF CROSS MOTION TO DISMISS COMPLAINT,
AND SUPPORTING PAPERS

5. Upon realization that her possessions, if nothing further were to be done, would be left on the sidewalk, the plaintiff BROOKS then asked me whether I could arrange to move said furnishings to a warehouse for the purpose of storage. I stated that FLAGG BROTHERS, INC. maintains storage space and could accomodate the plaintiff at our usual rates in both the transportation and storage. I further specified to plaintiff BROOKS that she would have to pay the transportation charges together with accessorial charges for the removal from the sidewalk to the warehouse and in addition pay the storage charges. She requested an estimate and I gave her an oral estimate of \$200 solely for the transportation phase of the job based upon a six hour moving job including loading and unloading. This charge was calculated upon our rates of \$28 per hour for a van and three men and upon an estimate of a number of barrels and cartons to be used on the job. I further explained that her furnishings would be loaded into three containers for storage purposes; that our storage rates were \$25 per month per container and consequently the entire monthly charge would be \$75 per month. I explained to the plaintiff that the storage charges did not run on a 30-day basis, i.e. from June 13, 1973 to July 12, 1973, but that industry practice was to charge for a full calendar month no matter what day of the month the storage was placed and that the \$75 charge therefor carried her until June 30, 1973; that on July 1, 1973 an additional \$75 would be due for the period up until July 31, 1973. The plaintiff was well aware of all of these facets of the transaction at the time she authorized us to store her goods, and I might add that she was extremely pleased that we could and would store her goods. The alternative was leaving plaintiff's goods on the sidewalk after execution of the eviction

DEFENDANTS' NOTICE OF CROSS MOTION TO DISMISS COMPLAINT, AND
SUPPORTING PAPERS

order. The plaintiff BROOKS agreed to the above arrangement and at her specific direction we moved her furnishings to storage on June 13, 1973. Plaintiff paid \$178 at that time on account.

6. A few days thereafter the plaintiff came to our office where she was given a Bill of Lading, annexed hereto as Exhibit "A". The Bill of Lading specifies each of the charges which were incurred in the removal. The Bill of Lading specifically sets forth storage charges of \$75 per month. In addition, the plaintiff was given a Household Goods Descriptive Inventory List, annexed hereto as Exhibit "B", which sets forth the nature of her belongings placed in storage. We have used this type of documentation in eviction instances rather than a warehouse receipt. The same information is recorded in both events.

7. At the end of June plaintiff telephoned me and for the first time expressed dissatisfaction with the monthly storage charge agreement. She further indicated that she would not be able to remove her belongings in the month of July. Plaintiff again called sometime in July and arranged with my secretary for an August removal date from storage. At that time she would have owed \$156 (shown as the balance due on Exhibit "A", Bill of Lading) plus \$150 for two months of storage (July and August, 1973).

8. Having received no additional payment of August 22, 1973, I sent the plaintiff a note requesting payment, attached as Exhibit "C", together with a Final Notice, attached as Exhibit "D".

9. Notwithstanding commencement of preliminary steps,

DEFENDANTS' NOTICE OF CROSS MOTION TO DISMISS COMPLAINT, AND
SUPPORTING PAPERS

we did not avail ourselves of the remedy of foreclosure of our Warehousemen's Lien as provided under the Uniform Commercial Code. Instead, pursuant to an agreement between the attorneys, we premitted the plaintiff to remove her goods from the warehouse on January 24, 1974 without payment of any charges for storage. In point of fact, the only amount the plaintiff paid was \$178 as an advance against the transportation service incurred back on June 13, 1973 at the time of the removal of her belongings from the sidewalk to the warehouse.

10. The facts demonstrate that the plaintiff authorized and indeed encouraged our taking possession of her belongings for storage; that prior to our taking possession the rates and charges were fully explained to her and that she understood and consented thereto; that the Household Goods Descriptive Inventory List specifies three boxes to be stored and that the Bill of Lading specifies storage charges of \$75 per month. There was agreement as to the charges at the time plaintiff urgently needed our services to safeguard her property; disagreement on part of plaintiff only occurred conveniently after the safety of her property was realized.

AS TO JONES CLAIM

11. On November 26, 1973 I accompanied the City Marshall to 353 Mundy Lane, Mount Vernon, New York, to the apartment of the plaintiff GLORIA JONES who was being evicted pursuant to court order on that day. Again, the purpose of my visit was to determine the manpower needs for and the time of the actual removal of plaintiff's goods from the apartment to the sidewalk. Also, again in so doing I was acting solely on behalf of the landlord through the City Marshall.

DEFENDANTS' NOTICE OF CROSS MOTION TO DISMISS COMPLAINT, AND
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12. Plaintiff Jones called the Department of Social Services for the purpose of obtaining funds to pay the overdue rent and thereby satisfy the judgment. She told us that the request was refused, but that the Department would pay for the transportation of her belongings to our warehouse and for one month's storage. I confirmed this. I advised Mrs. Jones that her belongings would be stored in three (3) crates at a storage rate of \$25.00 per crate per month and further that after the Department ceased storage payment, it would be her obligation. She stated that her belongings would not be in storage more than a month because she had another apartment ready for her occupancy.

13. Plaintiff Jones' statement on page 2 of her affidavit that she did not authorize Flagg Brothers, Inc. to storage her property is absurd. We loaded her belongings from her apartment to the truck in her presence and with her approval. If the loading was being done against her will or without her authorization, she could have called the authorities to stop us. The fact is she was present; she knew what was going on; and she requested us to perform the job that was going on.

14. Attached hereto as Exhibit "E", is a letter dated December 13, 1973 from the Department of Social Services to Flagg Brothers, Inc. authorizing payment of one month's storage charges for Mrs. Jones, and as Exhibit "F" a copy of a letter dated January 31, 1974 from the Department of Social Services to Mrs. Jones advising that it would not pay her storage charges thereafter incurred.

15. A Bill of Lading was issued on ~~December~~ ^{Nov.} 26, 1973 together with a Household Goods Inventory List specifying the property of Mrs. Jones taken into storage. The storage charges

DEFENDANTS' NOTICE OF CROSS MOTION TO DISMISS COMPLAINT, AND
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are likewise specified on the Bill of Lading. These documents are annexed hereto as Exhibits "G" and "H" respectively.

16. Attached to plaintiff Jones' affidavit is Exhibit "A", purporting to be a notice which it is not. I do not know who prepared the original. It appears to be a scrap of paper showing the charges she owed as of March 31, 1974, i.e. a total of \$335.00. This represents three months' storage at \$75.00 per month, a platform charge for removal of \$75.00 (this is the customary labor charge for transferring the storage lot from its place in the warehouse to the dock for pickup) and a \$35.00 auctioneer's fee.

17. At no time did we advise Mrs. Jones that her storage bill was \$600.00 or \$500.00 or anything other than the actual amount incurred as of the date the information was given. I believe that she is confused and has included those figures in the cost of actually moving her belongings from the warehouse to her new apartment together with the storage charges.

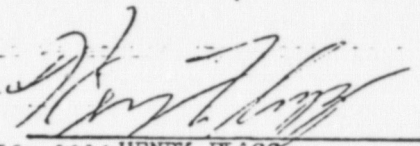
18. The fact is that from January 1, 1974 through September 30, 1974, Mrs. Jones owes Flagg Brothers, Inc. seven (7) months' storage at \$75.00 per month, a platform charge of \$75.00, and an auctioneer's fee of \$35.00 making a total of \$635.00.

19. On three occasions Mrs. Jones advised me that she would pay her storage bill for release of her goods, and we brought her storage lots to the platform on a day and hour specified by her, and on none of those occasions did she appear. This necessitated double labor by our employees for each occasion. See letter of my attorneys dated June 28, 1974 to Mrs. Jones' attorneys attached to her affidavit as Exhibit "E".

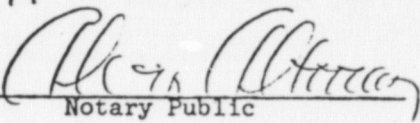
DEFENDANTS' NOTICE OF CROSS MOTION TO DISMISS COMPLAINT, AND
SUPPORTING PAPERS

20. Mrs. Jones agreed to our charges and authorized us to remove her belongings for storage. As long as she was of the belief that the Department of Social Services would pay for her charges, there was no dispute. After the Department notified her it would no longer pay the charges, Mrs. Jones decided that they were unreasonable.

WHEREFORE, it is respectfully prayed that plaintiff's motion for summary judgment be denied and that defendant's cross motion to dismiss for failure to state a cause be granted in all respects.


amount incurred as of the date HENRY FLAGG
believe that she is confused and has included those figures

Sworn to before me this 10th day of September, 1974


Notary Public

ALVIN ALTMAN
Notary Public, State of New York
No. 30-5060740
Qualified in Nassau County
Commission Expires May 30, 1975

DEFENDANTS' NOTICE OF CROSS MOTION TO DISMISS COMPLAINT, AND SUPPORTING PAPERS
Combined Uniform Household Goods Bill of Lading and Freight Bill — New York Commercial Zone.

'FLAGG BROS. INC., MOVING & STORAGE'

N.Y.C.—M.T. No. **826**

247 SO. FIFTH AVENUE

MT. VERNON, N. Y. 10550

946-C082

W. B. Reached at: 9:30 AM - 70 E. 10th Ave - Mt. Vernon - 668-6414 - April 11
 914-669 7261 - 212 324-5466

NAME Shirley Brooks Tel. _____
 FROM 33 E. Third Ave. Apt. _____
Mt. Vernon, N.Y.
 TO Storage Apt. _____
 OTHER STOPS _____
 MOVING DATE 5/13/73 DAY Tue. TIME _____ A.M. P.M.

TIME RECORD
 Start _____ A.M. P.M. _____
 Finish _____ A.M. P.M. _____
 JOB HOURS _____
 TRAVEL TIME _____
 TOTAL HOURS 1.5

MOVING RATE: _____ VANS _____ MEN @ \$ _____ Per Job Hr., Plus _____ Hrs. Travel Time

ESTIMATE OR REMARKS
 (Approx. estimate—packing date—Instructions on job—or other info.)

VALUATION
 Customer (Shipper) is required to declare in writing the released value of the property. The agreed or declared value of the property is hereby specifically stated by the customer (shipper) and confirmed by their signature hereon to be NOT exceeding 30 () cents per pound per article unless specifically excepted. The Customer (Shipper) hereby declares valuations in excess of the above limits on the following articles:

Article	Value

IMPORTANT
 (SIGN BEFORE START OF ANY SERVICE)
 The Shipper, subject to and based on the rates, rules, regulations, and conditions in the carriers lawfully published tariff hereby orders the carrier to furnish transportation facilities and service described herein subject to all conditions herein contained including valuation agreed or declared and the conditions on the back hereof which are hereby agreed to by the Shipper and accepted for himself and his assigns. Unless credit arrangements are made in writing the Shipper agrees to pay charges in cash, money order, or certified check prior to complete delivery.

CUSTOMER: Shirley Brooks
 By: _____
 MOVER: FLAGG BROS. INC., MOVING & STORAGE
 By: _____

DELIVERY RECEIPT
 Except as specifically endorsed hereon
 All services and All articles received in Good Condition
 CUSTOMER: Shirley Brooks
 By: _____

RATES and DESCRIPTION	CHARGES
MOVING <u>1.5</u> hours @ \$ <u>2.00</u> per hr.	
OVERTIME _____ hours @ \$ _____ per hr.	
CARTAGE _____ cu. ft. @ \$ _____ per cu. ft.	
WEIGHT _____ lbs. @ \$ _____ per lb.	
PIANO CHGS. _____	
OTHER <u>Storage 1.00</u>	<u>1.00</u>
Barrels, packed _____ @ \$ _____ each	
<u>15</u> Barrels, loaned _____ @ \$ <u>2.00</u> each	<u>30.00</u>
Wardrobes _____ @ \$ <u>1.00</u> each	
<u>6</u> Cartons o. boxes _____ @ \$ <u>1.50</u> each	<u>9.00</u>
<u>5</u> Matt Cartons _____ @ \$ <u>6.00</u> each	<u>30.00</u>
Other _____	

Whse. Labor chgs. _____
 Storage chgs. 1.00
 Other _____
 Insurance: shipper declares the full value of the shipment for the purpose of insurance to be: Amt. \$ _____ per \$100.00
TOTAL CHARGES
 Advance Deposit _____
 BALANCE DUE 1.00

RECEIVED PAYMENT
 MOVER FLAGG BROS. INC., MOVING & STORAGE
 By: _____

MOVER'S (Carrier) COPY (TO BE RETAINED BY MOVER) TERMS: Charges Payable in Cash, Money Order, or Certified Check on Delivery.

FORM 322-A, REV. 1-65, INC., 135 SCHMIDT BLVD., FARMINGDALE, N.Y. 11735

5-1-1-1 "A"

DEFENDANTS' NOTICE OF CROSS MOTION TO DISMISS COMPLAINT, AND SUPPORTING

PAPERS

FLAGG BROS. TRUCKING SERV., INC.
247 SO. FIFTH AVENUE - MOUNT VERNON, N. Y. 10550

Phone 668-9261

MESSAGE

REPLY

TO	DATE
Ms. Shirley Stone Brooks	
DATE 8/22/73	
Dear Ms. Stone:	
Your account has to be brought up to date within 10 days of the date of this letter (Sept. 1, 1973) or your furn. will go up for sale.	
It, (your storage payments) have to be paid each month on the 1st and has to be kept up or your furniture will be sold. Your previous bal. from Moving due 156.00	
storage for 7/73 & 8/73 150.00 @ \$75.00 a month	
SIGNED Respectfully your, H. Flagg, Pres.	SIGNED Total Due 306.00

FORM AVAILABLE FROM FLAGG CO., INC.
662 THIRD AVE., N.Y.C. 10017

DETACH THIS COPY-RETAIN FOR ANSWER. SEND WHITE AND PINK COPIES WITH CARBONS INTACT.

Exhibit "C"

FINAL NOTICE

FLAGG BROS. INC., MOVING and STORAGE

41 EAST 3rd ST. MT. VERNON, N.Y. 10550

Phone: (914) 668-9261 and (212) 324-5466

August 22, 1973

Shirley Brook Stone c/o M. Robinson

40 E. Sidney Ave.

Mt. Vernon, N.Y.

Dear Ms. Stone:

Your Storage Account, amounting to \$150.00 is now seriously overdue, and we herewith request that you make a payment on same on or before Sept. 1, 1973.

Unless such payment is made we will be obliged to advertise your goods for sale at public auction.

Thanking you for your immediate attention to this matter, we are

(Read other side)

Very truly yours, H. Flagg, Pres
FLAGG BROS. INC., MOVING and STORAGE

cc: sold. Your previous

Respectfully yours,

SIGNED

DEFENDANTS' NOTICE OF CROSS MOTION TO DISMISS COMPLAINT, AND
SUPPORTING PAPERS

Edwin G. Michaelian
COUNTY EXECUTIVE



County of Westchester
DEPARTMENT OF SOCIAL SERVICES

DIVISION OF FAMILY AND CHILD SOCIAL SERVICES

Leonard Berman
COMMISSIONER

John J. Allen
DIRECTOR

• Flagg Brothers Moving & Storage
41 East 3rd Street
Mount Vernon, N.Y.

December 13, 1973

RE: Gloria Jones
353 Mundy Lane
Mount Vernon, N.Y.

1. 10 Mitchell Place
White Plains, N. Y. 10601
Tel: 949-1300
2. Grasslands Hospital - M. A. Office
Valhalla, N. Y. 10595
Tel: 592-8500, Ext. 2739
3. 25 Bradhurst Avenue
Hawthorne, N. Y. 10532
Tel: 592-8500, Ext. 2272
4. 9 South First Avenue
Mt. Vernon, N. Y. 10550
Tel: 664-4224
5. 25 Moore Avenue
Mt. Kisco, N. Y. 10549
Tel: 666-7511
6. 524 North Avenue
New Rochelle, N. Y. 10801
Tel: 636-0800
7. 203 North Highland Avenue
Ossining, N. Y. 10562
Tel: 762-3324
8. 750 Washington Avenue
Peekskill, N. Y. 10566
Tel: 739-6500
9. 111 South Ridge Street
Port Chester, N. Y. 10573
Tel: 937-1100
10. Lyceum Bldg.
Tarrytown, N. Y. 10591
Tel: 631-7331
11. 85 Court Street
White Plains, N. Y. 10601
Tel: 428-9200
12. 70 Ashburton Avenue
Yonkers, N. Y. 10701
Tel: 963-7450
13. 326 South Broadway
Yonkers, N. Y. 10701
Tel: 963-7450
14. 30 Manhattan Avenue
White Plains, N. Y. 10607
Tel: 428-9194

Dear Sir:

Please be advised that we are only authorizing payment for one month's storage of client's furniture (11/25/73 thru 12/25/73). We will not be held responsible for any costs incurred if furniture is left in storage beyond this period.

Yours truly,
DIVISION OF FAMILY AND CHILD SOCIAL SERVICES.

C. Cookman
(Mrs.) C. Cookman
Employment Worker

Send Replies to: Division of Family and Child Social Services
Use Address No.

Exhibit "E"

DEFENDANT'S NOTICE OF CROSS MOTION TO DISMISS COMPLAINT, AND
SUPPORTING PAPERS

Ms. Gloria Jones
2 G. Godwin
616 East Lincoln Avenue
Mount Vernon, N.Y.

January 31, 1974

Dear Ms. Jones:

Please be advised that the approval for the storage of your furniture has expired. We have no responsibility for your furniture, storage and or other fees.

This Agency will not be involved in relocating you into an unfurnished apartment. We recommend that you locate a furnished apartment or a furnished room.

Yours very truly,
DIVISION OF FAMILY AND CHILD SOCIAL SERVICES

C. Cookman

(Mrs.) C. Cookman
Employment Worker

CC: Flagg Brothers
CC/ew

G. Jones

HAS To get in touch with

DEFENDANTS' NOTICE OF CROSS MOTION TO DISMISS COMPLAINT, AND SUPPORTING

FLAGG BROS. TRUCKING SERV., INC.

N.Y.C.-M.T. No. 4 1/2 EAST THIRD STREET MOUNT VERNON, N.Y. 10550

Phone 662-9261

1-4/74 PAPERS

45-7585

DSS Not Paying Any More

NAME Gloria Jones Tel. _____
 FROM 353 Mundy Lane Apt. _____
Mt. Vernon, N.Y.
 TO Storage Apt. _____
 OTHER STOPS _____
 MOVING DATE 11/26/73 DAY Monday TIME _____ A.M.
 P.M.

TIME RECORD
 Start 11:30 A.M. Customer Initials _____
 Finish 6:00 A.M. Customer Initials _____

JOB HOURS 7
 TRAVEL TIME 1
 TOTAL HOURS 7 1/2

MOVING RATE: 1 VANS 3 MEN @ \$28.00 Per Job Hr., Plus 1 Hrs. Travel Time

ESTIMATE OR REMARKS
 (Approx. estimate—packing date—Instructions on job—or other info.)
Dept. of Social Service

Mt. Vernon, N.Y.

Ms. Cookman

VALUATION

Customer (Shipper) is required to declare in writing the released value of the property. The agreed or declared value of the property is hereby specifically stated by the customer (shipper) and confirmed by their signature hereon to be NOT exceeding 30 () cents per pound per article unless specifically excepted. The Customer (Shipper) hereby declares valuations in excess of the above limits on the following articles:

Article	Value

IMPORTANT

(SIGN BEFORE START OF ANY SERVICE)

The Shipper, subject to and based on the rates, rules, regulations, and conditions in the carriers lawfully published tariff hereby orders the carrier to furnish transportation facilities and service described herein subject to all conditions herein contained including valuation agreed or declared and the conditions on the back hereof which are hereby agreed to by the Shipper and accepted for himself and his assigns. Unless credit arrangements are made in writing the Shipper agrees to pay charges in cash, money order, or certified check prior to complete delivery.

CUSTOMER: Gloria Jones

By: _____

MOVER: FLAGG BROS. TRUCKING SERV., INC.

By: _____

DELIVERY RECEIPT

Except as specifically endorsed hereon
 All services and All articles received in Good Condition

CUSTOMER: Gloria Jones

By: _____

RATES and DESCRIPTION	CHARGES
MOVING <u>7</u> hours @ <u>\$28.00</u> per hr.	<u>196.00</u>
OVERTIME _____ hours @ \$ _____ per hr.	
CARTAGE _____ cu. ft. @ \$ _____ per cu. ft.	
WEIGHT _____ lbs. @ \$ _____ per lb.	
PIANO CHGS. _____	
OTHER <u>Travel time</u>	<u>14.00</u>
<u>13</u> Barrels, packed @ \$ _____ each	
<u>13</u> Barrels, loaned @ <u>\$3.00</u> each	<u>39.00</u>
Wardrobes _____ @ \$ _____ each	
Cartons or boxes _____ @ \$ _____ each	
<u>4</u> Matt Cartons @ <u>\$6.00</u> each	<u>24.00</u>
Other <u>fumigating</u>	<u>8.00</u>

Whse. Labor chgs. _____	
Storage chgs. _____	<u>75.00</u>
Other _____	

Insurance: shipper declares the full value of the shipment for the purpose of insurance to be:
 Amt. \$ _____ @ \$ _____ per \$100.00

TOTAL CHARGES

Advance Deposit

BALANCE DUE

356.00

RECEIVED PAYMENT

MOVER: FLAGG BROS. TRUCKING SERV., INC.

By: _____

MOVER'S (Carrier) CO. BY _____
 TO BE RETAINED BY MOVER

TERMS: Charges Payable in Cash, Money Order, or Certified Check on Delivery.

FORM 252A

MILBURN PRINTING, INC., 135 SCHMITT BLVD., FARMINGDALE, N.Y. 11735

Exhibit "C"

DEFENDANTS' NOTICE OF CROSS MOTION TO DISMISS COMPLAINT, AND SUPPORTING PAPERS

CONTRACTOR OR CARRIER		HOUSEHOLD GOODS DESCRIPTIVE INVENTORY		PAGE NO.	NO. OF PAGES
		AGENT Flagg Bros., Inc.		CARRIER'S REFERENCE NO.	
OWNER'S GRADE OR RATING AND NAME Gloria Jones				CONTRACT OR GBL NO.	
ORIGIN LOADING ADDRESS 353 Mundy Lane, Mt. Vernon, N.Y.		CITY STATE		GOVT. SERVICE ORDER NO.	
DESTINATION				VAN NUMBER	
BE-BENT BR-BROKEN BU-BURNED CH-CHIPPED CU-CONTENTS & CONDITION UNKNOWN		D-DENTED F-FADED G-GOUGED L-LOOSE M-MARRED MI-MILDEW		EXCEPTION SYMBOLS MO-MOTHEATEN PBC-PACKED BY CARRIER PBO-PACKED BY OWNER	
		R-RUBBED RU-RUSTED SC-SCRATCHED SH-SHORT		SO-SOILED T-TORN W-BADLY WORN Z-CRACKED	
				LOCATION SYMBOLS 1. ARM 6. LEGS 2. BOTTOM 7. REAR 3. CORNER 8. RIGHT 4. FRONT 9. SIDE 5. LEFT 10. TOP 11. VENEER	
NOTE: The omission of these symbols indicates good condition except for normal wear.					
ITEM NO.	QTY	DESCRIPTION	EXCEPTIONS (BY UNIT)	AT DESTINATION	
1	1	dining table			
2	1	air conditioner			
3	1	stove			
4	1	refrigerator			
5	1	stereo			
6	1	kitchen cabinet			
7	3	rugs / padding			
8		record stand & records			
9		vacuum cleaner			
0		ironing board			
1		Lamp			
2	16	Barrels	CU		
3		boxes	CU		
4		Straw loveseat			
5	2	chairs			
6	2	end tables			
7	6	dining chairs	(4 Containers)		
8	1	coffee table			
9	1	club chair			
0	1	sofa			
1	1	break front			
2	3	dressers			
3	4	nite stands			
4	4	lamps shades			
5	1	headboard			
6	4	pc. marbles			
7	2	mirrors			
8	2	boxsprings			
9	2	mattresses			
0		Long pole(not in Harrison)			
ITEM NO.	REMARKS/EXCEPTIONS				
"We have checked all the items listed and numbered 1 to _____ inclusive and acknowledge that this is a true and complete list of the goods tendered and of the state of the goods received."				INVENTORY NUMBER	
AT ORIGIN		CONTRACTOR, CARRIER OR AUTHORIZED AGENT (DRIVER)	DATE	AT DESTINATION	
		(SIGNATURE)		(SIGNATURE)	
		OWNER OR AUTHORIZED AGENT	DATE	OWNER OR AUTHORIZED AGENT	
		(SIGNATURE)		(SIGNATURE)	

REORDER MILBURN PRINTING, INC., 135 SCHMITT BLVD., FARMINGDALE, N.Y. 11735

FORM 1190-B

DEFENDANTS' NOTICE OF CROSS MOTION TO DISMISS COMPLAINT, AND
SUPPORTING PAPERS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SHIRLEY HERRIOTT BROOKS as individually
and on behalf of all others similarly situated,

Plaintiff,

and

GLORIA JONES,

Plaintiff-
Intervenor,

73 CIV. 4050
HFW

- against -

AFFIDAVIT

FLAGG BROTHERS, INC., Individually and
as representative of a class of all others
similarly situated, HENRY FLAGG, in-
dividually and as President of FLAGG
BROTHERS, INC.,

Defendants,

and

THE ATTORNEY GENERAL OF THE STATE OF
NEW YORK, AMERICAN WAREHOUSEMEN'S ASSOCI-
ATION, INTERNATIONAL ASSOCIATION OF
REFRIGERATED WAREHOUSES, INC., WARE-
HOUSEMEN'S ASSOCIATION OF THE PORT OF
NEW YORK, COLD STORAGE WAREHOUSEMEN'S
ASSOCIATION OF THE PORT OF NEW YORK,

Defendants-
Intervenors.

STATE OF NEW YORK)

NEW YORK) ss.:
COUNTY OF NEW YORK)

HENRY C. BRENGEL, JR., being duly sworn, deposes and says:

1. I am president of the New York State Movers and Warehousemen's

Association, Inc., a non-profit membership corporation of the State of

DEFENDANTS' NOTICE OF CROSS MOTION TO DISMISS COMPLAINT, AND
SUPPORTING PAPERS

New York comprised of approximately 250 movers and warehousemen certificated to transport household goods either in intrastate commerce by the New York Department of Transportation or in interstate commerce by the Interstate Commerce Commission, or by both agencies. Approximately 98% percent of our members maintain warehouses for storage of household goods.

2. I am also president of Empire Storage Warehouse, Inc. located at 80 Duffy Avenue, Hicksville, New York, a certificated carrier of household goods in intra and interstate commerce. We have been in the business since 1904. We maintain a warehouse for the storage of household goods approximately 20,000 square feet in size at the above address and operate 14 pieces of equipment. I have 30 years experience in the moving and storage business and am fully knowledgeable of all of its phases.

3. The purpose of this affidavit is to apprise the Court of the industry practices in the storage of household goods with respect to all facets of an operation from the initial contact of the warehouseman to the final disposition of the storage lot in the event of foreclosure.

4. Although the exhibits annexed represent documentation of my company, the forms and procedures specified herein are typical of those utilized generally in the moving and storage industry.

5. When we are contacted by a customer who wants to storage his household effects we initially send a salesman to make a survey and give an estimate. Our charges are made upon a cubic foot basis. A copy of our estimate form is annexed as Exhibit "A".

6. If the customer decides to use our service the driver takes a storage contract with him on the day of the move for execution by the depositor. The storage contract which is annexed as Exhibit "B"

DEFENDANTS' NOTICE OF CROSS MOTION TO DISMISS COMPLAINT, AND
SUPPORTING PAPERS
provides the exact storage rates.

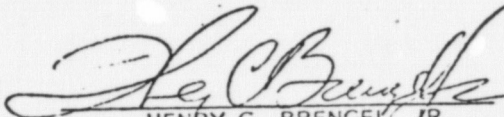
7. Upon receipt of the household effects at the warehouse we prepare an inventory list or warehouse receipt containing an itemization of the depositor's belongings. This document is annexed as Exhibit "C". The list is normally sent to the customer a few days after his belongings have been stored.

8. We have been engaged by the Marshall of the District Court of Nassau County to effect evictions from apartment to sidewalk pursuant to court order. In those instances a local moving ticket is used for the apartment to sidewalk move and given to the Marshall. ~~A copy of the ticket is annexed as Exhibit "D".~~ On these occasions we have been requested by the owner of the property to storage it at our warehouse instead of leaving it on the sidewalk. My driver takes a storage contract with him on these evictions anticipating such a storage request. The contract is executed by the owner at that time (Exhibit "B") and the inventory list (Exhibit "C") is sent a few days later. The procedure and documentation in essence is the same in the eviction storages as in the usual storage situations.

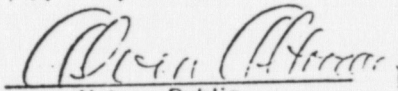
Normally after two months delinquency in payment of storage charges we begin to contact the customer for payment. We do not invoke the foreclosure provisions of the Uniform Commercial Code for approximately 9 months to one year after non-payment. Then we follow the enforcement steps of the Section 7-210 of the Code to the letter. In fact, we send not only the notice required under Section 7-210(2), (Exhibit "E"), but an additional notice form which is not required (Exhibit "F"). We also send the notices by registered or certified mail as required and additionally by regular mail which is not required. The reason for this dual mail use is to make absolutely certain the depositor receives the notice of sale in the event the registered or certified mail is not forwarded to a different address than that which was given to us.

DEFENDANTS' NOTICE OF CROSS MOTION TO DISMISS COMPLAINT, AND
SUPPORTING PAPERS

10. The warehouseman does not resort to the sale of a depositor's belongings lightly. When he is ultimately required to because of a continuing and unremitting delinquency in payment by the depositor resulting in the non remunerative use of warehouse space, the industry practices following the Uniform Commercial Code insure ample notice and opportunity to protest. If the storage charges are in dispute, although it is difficult to contemplate such to be the case bonafidely since the charges are detailed in the contract, we would not sell if the depositor tendered the amount he believed to be owing because of the risk of being held liable for conversion under the Code.


HENRY C. BRENZEL, JR.

Sworn to before me this
2 day of OCT 1974


Notary Public

ALVIN ALTMAN
Notary Public, State of New York
No. 30-5060740
Qualified in Nassau County
Commission Expires May 30, 1975

LOCAL MOVING & STORAGE ESTIMATE

AGENT FOR: NORTH AMERICAN VAN LINES, INC.

80 DUFFY AVENUE
HICKSVILLE, N. Y. 11801
(516) 931-0010

**Empire Storage
WAREHOUSE**

Local & Long Distance Moving
Storage - Packing
Rug Cleaning

Date of Estimate..... Packing Date..... Moving Date..... Phone.....

Name..... To.....

Address..... Floor..... Address..... Floor.....

City..... Apt..... City..... Apt.....

LOCAL MOVING PROPOSAL

Furnish..... Van and..... Men for..... Hours at..... Per Hour.....

Extra Pickup-Drop Off - At.....

Piano (type).....

Insurance \$..... Valuation at \$..... per hundred dollars.....

Other Services.....

STORAGE PROPOSAL

TOTAL.....

CARTAGE TO
WAREHOUSE
WAREHOUSE
LABOR

(In-Out)..... Men for..... Hours at \$..... per hour.....

Lbs. at \$..... per Lb.....

Cu. Ft. at \$..... per Cu. Ft.....

STORAGE

Lbs. at \$..... per hundred per month.....

Cu. Ft. at \$..... per cu. ft. " " " " " "

Insurance..... Valuation at \$..... per hundred per month.....

Wrapping.....

Other Services.....

TOTAL.....

REMARKS:

The charges indicated herein are estimated charges only. I understand that all charges are subject to actual time plus travel or actual weight, whichever is applicable. I further understand that unless a greater value is declared herein by me, my goods are released to the carrier at a valuation of 30¢ per pound per article. I hereby agree to pay all charges by cash, certified check or money order upon delivery of my goods.

X

SHIPPER

MOVER

Date

PACKING PROPOSAL

Barrels at \$..... per \$.....

Carton 1 1/2 cu. at \$..... per.....

Carton 3 cu. at \$..... per.....

Carton 4 cu. at \$..... per.....

Carton 6 cu. at \$..... per.....

Mattress ctn. at \$..... per.....

Mattress bags at \$..... per.....

Wardrobes at \$..... per.....

Mirror etc. at \$..... per.....

TOTAL.....

DEFENDANTS' NOTICE OF CROSS MOTION TO DISMISS COMPLAINT, AND SUPPORTING PAPERS
 CONTRACT FOR MOVING AND STORAGE SERVICES
 New York Standard Form Approved 1/54
 WElls 1-0010
 EMPIRE STORAGE WAREHOUSE, Inc.
 Storage-Local & Long Distance Moving-Packing-Crating-Shipping
 80 DUFFY AVE. HICKSVILLE, L.I.N. Y.
 WElls 1-0325

The customer designated below agrees to hire the above named company herein after referred to as the company and the company agrees to perform the services designated below at the price specified in this contract and subject to the terms and conditions printed on the reverse side which are made a part hereof.
 The following service or services are to be performed for the account of

on 19 A.M. 19 P.M. Preliminary Packing Date 19 A.M. 19 P.M.

From Apri El Phone

To Apri El Phone

Goods to be stored at Apri El Phone

Final charges to be determined by actual cubic measurement.

Estimated as follows:

STORAGE cu. ft. @ \$ per cu. ft. per mo.

Vault Sigs. per mo. \$ Rugs

Piano Sigs. per mo. \$ Grand

Upright

Carriage In cu. ft. @ \$ per cu. ft.

Labor In cu. ft. @ \$ per cu. ft.

Piano cartage \$ Hoist chgs.

SPECIAL REMARKS

MOVING RATES: 8 A.M. to 5 P.M. Monday to Friday

(Except Holidays)

Van and men @ \$ per hour

OVERTIME RATES: per hour

3% Federal Transportation Tax

Hour traveling time will be charged each way

to and from the job.

TERMS: Cash. Driver will collect

Time Start: A.M. P.M. Cus. Sig.

Time Finish: A.M. P.M. Cus. Sig.

PACKING MATERIAL: RENTALS OR FURNISHING — RUG CLEANING — FUMIGATION

Estimated quantities — charge to be made for material actually used.

Barrels @ \$ Each Book ctns. @ \$ Each Misc.

Wardrobes @ \$ Each Lamp Shade ctns. @ \$ Each

Boxes @ \$ Each Matt. ctns. @ \$ Each

Crates @ \$ per cu. ft. Paper & Pad @ \$ Each

RUGS: Dust clean. @ \$ per sq. ft. Shampoo @ \$ per sq. ft. Moth Proof @ \$ per sq. ft.

SPECIAL REMARKS

Rates are based on, and this contract is subject to the limits of liability set forth on reverse side of contract, unless

excess valuation is declared herein and itemized list is furnished in writing by the customer and attached hereto.

TOTAL EXCESS VALUATION \$ PER \$100 . . . TOTAL \$

It is agreed that this contract which includes terms and conditions printed on the reverse side hereof, shall constitute the entire agreement between the parties and no statement or promise not contained herein shall be binding or valid.

I have read this contract and the terms and conditions on the reverse side hereof and agree to all the said terms and conditions and acknowledge receipt of copy herewith.

Accepted for the Company

EMPIRE STORAGE WAREHOUSE, Inc.

Customer's or Agent's Signature

Permanent Address

SEE REVERSE SIDE FOR TERMS, CONDITIONS AND LIMITS OF LIABILITY.

FORRESTER HILSH PRINTING INC., 800 UNION ST., BROOKLYN 15, N. Y.

Page 196

Exhibit "R"

DEFENDANTS' NOTICE OF CROSS MOTION TO DISMISS COMPLAINT, AND
SUPPORTING PAPERS.

New York State Supreme Court
County of New York
In and for the City and County of New York

EMPIRE STORAGE WAREHOUSE, INC.
80 DUFFY AVE.
JACKSONVILLE, FLA. 32202

CONTRACT FOR MOVING AND STORAGE SERVICE

2-11-70-010

The customer designated below agrees to the above named company's terms and conditions as set forth in this contract and to the terms and conditions on the reverse side which are made a part hereof.

The following services or services are to be performed for the account of

The customer and the company agree to the following terms and conditions:

1. **OWNERSHIP OF PROPERTY:** The customer has represented and warranted to the company that he is the legal owner or in lawful possession of the property and has the legal right and authority to contract for services for all of the property rendered, upon provisions, limitations, terms and conditions herein set forth and that there are no existing liens, mortgages or encumbrances on said property. If there be any litigation as a result of the breach of this clause customer agrees to pay all charges that may be due together with such costs and expenses including attorney fees which this company may reasonably incur or become liable to pay in connection therewith and this company shall have a lien on said property for all charges that may be due thereon as well as for such costs and expenses.
2. **PAYMENTS:** Storage accounts are due and payable monthly in advance. Interest will be charged on accounts unpaid for a period of three months after they become due. The company has a lien on all goods moved or stored to secure payment for charges for all services rendered. All charges must be paid in cash, money order, or certified check before delivery or transfer of goods deposited under this contract and no transfer of title will be recognized unless entered on the books of this company.
3. **LIABILITY OF THE COMPANY:** (a) The company when transporting to or from the warehouse for permanent storage acts as a private carrier only, reserving the right to refuse any order for transportation and in an event is a common carrier.
(b) This contract is accepted subject to delays or damages caused by war, insurrection, labor troubles, strikes, Acts of God or the public enemy, riots, the elements, street traffic, elevator service or other causes beyond the control of the company.
(c) The company is not responsible for any fragile articles injured or broken, unless packed by its employees and unpacked by them at the time of delivery and in no event shall the company be liable except for its own negligence. The company will not be responsible for mechanical or electrical functioning of any article such as but not limited to, pianos, radios, phonographs, television sets, clocks, barometers, mechanical refrigerators or air conditioners whether or not such articles are packed or unpacked by the company.
(d) No liability of any kind shall attach to this company for any damage caused to the goods by inherent vice, moths, vermin or other insects, rust, fire, water, deterioration or normal wear and tear.
(e) Unless a greater valuation is stated herein, the owner declares that the value in case of loss or damage whether arising out of storage, transportation, packing, unpacking, fumigation, cleaning or handling of the goods, and the liability of the company for any cause for which it may be liable for such loss or damage shall not exceed and is limited to FIFTY DOLLARS (\$50.00) or for the contents thereof, whichever is less, and the company shall not be liable for loss or damage to such goods in excess of TWO THOUSAND DOLLARS (\$2000) upon which declared or agreed value the rates are based, the owner having been given the opportunity to declare a higher valuation without limitation in case of loss or damage from a cause which would make the company liable and to pay the higher rate based thereon, and in no event however shall the company be liable except for its own negligence.
(f) In the event the company shall be requested by the customer to engage the services of others with respect to the transportation, repair, cleaning or servicing of any article, the company shall act as agent for the customer and shall not be liable for any damage arising out of such services rendered by others and shall not be liable for failure to execute any instructions except for such instructions that are in writing and acknowledged in writing by the company. In the event goods are delivered to another carrier, the company shall not be liable for loss or damage for any cause to said goods unless exception is noted in writing on the Delivery Receipt of this Company when delivery is made.
(g) The company shall not be responsible for loss of or damage to any article contained in drawers, or in packages, crates or containers not packed and unpacked by the company's employees and then only for such articles that are specifically listed by the customer and are receipted for by the company's employees.

- (h) In no event shall the company be responsible for loss or damage to documents, stamps, securities, specie or jewelry unless a special agreement in writing is made between the customer and the company with respect to such articles.
4. **MINIMUM PERIOD FOR STORAGE:** On storage accounts three months storage will be charged for any fraction of the first three months period. Thereafter one month storage rate will be charged for thirty days or less.
5. **TERMINATION OF STORAGE:** The company reserves the right to terminate storage of the goods at any time by giving the depositor thirty days written notice of its intention to do so and unless the depositor removes such goods within that period the company is hereby empowered to remove the same removed at the cost and expense of the depositor. And upon so doing the company shall be relieved of any liability with respect to such goods thereafter or hereafter incurred.
6. **ADDRESS AND CHANGE:** It is agreed that the address of the depositor of goods for storage is as given on the front side of this contract and shall be relied upon by the company as the address of the depositor until change of address is given in writing to the company and acknowledged in writing by the company and notice of any change of address will not be valid or binding upon the company if given or acknowledged in any other manner.
7. **TIME FOR FILING CLAIMS:** (a) As a condition precedent to recovery, claims must be filed in writing with the company within ten days after delivery of property and suit or arbitration must be instituted within six months from the day when notice in writing is given by the company to the customer that the company has disallowed the claim or any part thereof.
(b) Where claims are not filed nor suit or arbitration instituted in accordance with the foregoing provision, the company shall not be liable and such claims will not be paid.
(c) The company shall have the right to inspect and repair alleged damaged articles.
8. **GENERAL TERMS AND CONDITIONS:** (a) If goods cannot be delivered in the ordinary way by stairs or elevator, the owner agrees to pay an additional charge for hoisting or lowering or other necessary labor to effect delivery. Customer shall arrange in advance for all necessary elevator and other services and any charges for same shall be met by the customer. Customer agrees to pay the hourly charge in this contract for waiting time caused by lack of sufficient elevator service.
(b) Packing or moving charges do not include the taking down or putting up of curtains, mirrors, fixtures, pictures, electric or other fittings, or the relaying of floor coverings or similar services but if such services are ordered a charge will be made therefor.
(c) Company will charge for labor and materials supplied on all access to goods in the warehouse.
(d) Platform charge will be made when goods are delivered to an outside truckmen.
9. **CORRECTION OF ERRORS:** The depositor agrees that unless notice is given in writing to the company within ten days after the receipt of the inventory list accompanying the warehouse receipt and made a part thereof including any exceptions noted thereon as to the condition of the property when received for storage, the inventory list shall be deemed to be correct and complete.
10. **CONTRAVENION OF CLAIM:** Any controversy or claim arising out of or relating to this contract, the breach thereof, or the goods affected thereby, whether such claims be found in tort or contract shall be settled by arbitration law of the State of New York and under the rules of the American Arbitration Association, provided however, that upon any such arbitration the arbitrator or arbitrators may not vary or modify any of the foregoing provisions.
11. **AGREEMENT:** The contract represents the entire agreement between the parties hereto and cannot be modified except in writing and shall be deemed to apply to all the property whether household goods or goods of any other nature or description which the company may now or any time in the future store, pack, transport or ship for the owner's account.

IT IS AGREED THAT THIS CONTRACT AND ITS TERMS AND CONDITIONS SHALL BE A PART OF THE ENTIRE AGREEMENT BETWEEN THE PARTIES AND NO STATEMENT OR PROMISE OR AGREEMENT OR CONDITION SHALL BE BINDING UNLESS IT IS IN WRITING AND SIGNED BY BOTH PARTIES.

I have read this contract and the terms and conditions on the reverse side and agree to the same.

Accepted for the Company

Customer's or Agent's Signature

SEE REVERSE SIDE FOR TERMS, CONDITIONS AND LIMITS OF LIABILITY.

01-01-01



Packing - Crating - Shipping

80 DUFFY AVENUE

HICKSVILLE, L.I., N.Y. 11801

Phone: (516) 931-0010

et No

Date of Issue 19

RECEIVED for the account of

for storage, the goods or packages enumerated below, and subject to the terms and conditions on the reverse side of this receipt, said goods stored in warehouse located at No.

EMPIRE STORAGE WAREHOUSE Inc.

By

I have been very much interested in the progress of the work of the National Association of Manufacturers, and I am glad to hear that it is now in a position to be able to do more for the benefit of the country.

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DESCRIPTIVE SYMBOLS	EXCEPTION SYMBOLS	LOCATION SYMBOLS	SCHEDULE OF GOODS IMPORTANT
B/W - BLACK & WHITE TV C - COLOR TV CP - CARRIER PACKED PSM - PACKED BY OWNER CD - CARBIDE DISASSEMBLED SSB - DISASSEMBLED BY OWNER SR - PROFESSIONAL SIKES SE - SPECIAL EQUIPMENT PP - PROFESSIONAL PAPERS	BE - BENT BR - BROKEN BS - BURNED CB - CRACKED CU - CONTENTS & CON- TAINER UNHARMED D - DENTED F - FOLD G - GOUDED L - LOOSE	W - MARRED MI - MILDLY MD - MODERATELY CR - CRUSHED RU - RUBBED B - B - SCRATCHED SH - SHORT SO - SOILED T - TORN W-BADLY WORN Z - CRACKED	1. ARM 2. BOTTOM 3. CORNER 4. FRONT 5. LEFT 6. RIGHT 7. REAR 8. RICH 9. SIDE 10. TOP 11. VENER 12. EDGE
			Are your goods insured against fire? Read your policy and see that it covers the goods in the building in which they are stored. If not correct, please notify immediately.

NOTE: THE OMISSION OF THESE SYMBOLS INDICATE GOOD CONDITION EXCEPT FOR NORMAL WEAR.

SCHEDULE OF GOODS

IMPORTANT

Are your goods insured against fire?

Read your policy and see that it covers the goods in the building in which they are stored.

If not correct, please notify immediately.

Exhibit "C"

WAREHOUSE RECEIPT

TERMS AND CONDITIONS

The customer and the company agree to the following terms and conditions:

OWNERSHIP OF PROPERTY: The customer has represented and warranted to the company that he is the legal owner or in lawful possession of the property and has the legal right and authority to contract for services or all of the property tendered upon provisions, limitations, terms and conditions herein set forth and that there are no existing liens, mortgages or encumbrances on said property. If there be any lien or claim as a result of the breach of this clause, customer agrees to pay all charges that may be due together with such costs and expenses including attorneys fees which his company may reasonably incur or become liable to pay in connection herewith and this company shall have a lien on said property for all charges but may be due time as well as for such costs and expenses.

PAYMENT: (a) It is agreed that the company shall have a general lien upon any and all property deposited with it or hereafter deposited with it. If goods deposited upon which storage and all other charges are not paid due, will be sold at public auction to pay said accrued charges and expenses of the sale, after due notice to the depositor, and publication of the time and place of said sale, according to law.

(b) The company shall have a further lien for all monies advanced to by third parties for account of the depositor.

(c) Accounts are due and payable monthly in advance. Interest will be charged on accounts unpaid for a period of three months after they become due. All charges must be paid in cash, money order or certified check before delivery or transfer of goods deposited under this contract and no transfer shall be recognized unless entered on the books of the company.

LIABILITY OF THE COMPANY: (a) The company when transporting to or from the warehouse for permanent storage acts as a private carrier only, assuming the right to remove any order for transporting and in no event is a common carrier.

(b) This contract is accepted subject to delays or damages caused by war, insurrection, labor disputes, strikes, Acts of God or the public enemy, riots, elements, street traffic, elevator service or other causes beyond the control of the company.

(c) The company is not responsible for any fragile articles, jewelry or valuables, unless packed by its employees and unpacked by them at the time of delivery. The company will not be responsible for mechanical or electrical articles of any nature such as but not limited to, radios, phonographs, television sets, clocks, barometers, mechanical refrigerators or air conditioners or other instruments or appliances, whether or not such articles are packed or unpacked by the company.

(d) No liability of any kind shall attach to this company for any damage caused to the goods by inherent vice, moths, vermin or other insects, rust, fire, water, changes of temperature, fumigation or deterioration.

(e) Unless a greater valuation is stated herein, the depositor or owner admits that the value in case of loss or damage arising out of storage, transportation, packing, unpacking, fumigation, cleaning or handling of the goods and the liability of the company for any cause for which it may be liable for each or any storage or package and the contents thereof does not exceed and is limited to \$200.00 per pound per article, upon which is given the opportunity to declare a higher valuation without limitation in case of loss or damage. In any case which would make the company liable to pay the higher valuation, the depositor or owner shall be responsible for loss or damage to contents, stamps, securities, jewelry or other articles of high and unusual value unless a higher valuation in writing is made between the depositor and the company and accepted to such articles.

4. MINIMUM PERIOD FOR STORAGE: On storage accounts three months storage will be charged for any fraction of the first three months period. Thereafter one months storage rate will be charged for thirty days or less.

5. TERMINATION OF STORAGE: The company reserves the right to terminate storage of the goods at any time by giving the depositor 30 days written notice of its intention to do so and unless the depositor removes the goods within that period the company is hereby empowered to have the goods removed at the cost and expense of the depositor. And upon so doing the company shall be relieved of any liability with respect to such goods thereafter or thereafter incurred.

6. ADDRESS AND CHANGE: It is agreed that the address of the depositor of goods for storage is as given on the front side of this contract and shall be relied upon by the company as the address of the depositor until change of address is given in writing to the company and acknowledged in writing by the company and notice of any change of address will not be valid or binding upon the company if given or acknowledged in any other manner.

7. FILING OF CLAIM-NOTICE: (a) As a condition precedent to recovery, claim must be in writing, supported by a paid freight bill and filed with the company within sixty (60) days after delivery of the goods. No action may be maintained by the depositor against the company either by suit or arbitration to recover for claimed loss or damage, unless commenced within twelve (12) months next after the day of delivery by the company.

(b) The company shall have the right to inspect and repair alleged damaged goods.

8. CORRECTION OF ERRORS: The depositor agrees that unless notice is given in writing to the company within ten days after the receipt of the inventory list accompanying the warehouse receipt and made a part thereof, including any exceptions noted thereon as to the condition of the property when received for storage, the inventory list shall be deemed to be correct and complete.

9. ARBITRATION: Any controversy or claim arising out of or relating to this contract, the breach thereof, or the goods affected thereby, whether such claims be found in tort or contract shall be settled by arbitration law of the Company's State and under the rules of the American Arbitration Association, provided however, that upon any such arbitration the arbitrator or arbitrators may not vary or modify any of the foregoing provisions.

10. AGREEMENT: The contract represents the entire agreement between parties hereto and cannot be modified except in writing and shall be deemed to apply to all the property, whether household goods or goods of any other nature or description which the company may now or any time in the future store, pack, transport or ship for the owner's account.

11. GENERAL CONDITIONS: (a) If goods cannot be delivered in the ordinary way by stairs or elevator, the owner agrees to pay an additional charge for hoisting or lowering or other necessary labor to effect delivery. Customer shall arrange in advance for all necessary elevator and other services and any charges for same shall be met by the customer. Customer agrees to pay the hourly charge in this contract for waiting time caused by lack of sufficient elevator service.

(b) Packing or moving charges do not include the taking down or putting up of curtains, mirrors, fixtures, pictures, electric or other fittings, or the reaping of floor coverings or similar services but if such services are ordered a charge will be made therefor.

STORAGE RATES DO NOT INCLUDE INSURANCE

Warehouse Receipt

Non-Negotiable

LOT NO. ISSUED BY

Empire Storage Warehouse Inc.

Storage - Local & Long Distance Moving
Packing - Crating - Shipping
80 DUFFY AVENUE
HICKSVILLE, L.I., N.Y. 11801
Phone: (516) 931-0010

WAREHOUSE RULES

PLEASE READ

Present this Warehouse Receipt and a written order when any goods are to be withdrawn.

Reasonable notice is required for access to or delivery of goods.

Access to goods by appointment only.

A labor charge will be made for handling of and access to goods in the warehouse.

This Warehouse Receipt must be returned when all goods enumerated in the Schedule are to be withdrawn.

A platform charge will be made when goods are delivered to outside truckmen.

The final settlement of this account must be made in CASH, at this office. No checks will be accepted, upon withdrawal of goods unless certified.

FORM 210R

ORDER FOR DELIVERY

EMPIRE STORAGE WAREHOUSE Inc.

Kindly deliver goods on this warehouse receipt to

on

In case goods are delivered to truckmen other than the Company's Trucks, the responsibility of the Warehouse ceases when goods are delivered to said truckmen.

Goods for places where receipts are customarily refused or where no authorized person is present to sign for them, may be left at my risk.

Date _____ Customer or Agent's Signature _____

DELIVERY RECEIPT

EMPIRE STORAGE WAREHOUSE Inc.

The undersigned hereby acknowledges the delivery and receipt of all property as listed and described in this warehouse receipt and/or any supplemental list attached hereto and certifies that the same has been received on the above date in good condition and order unless otherwise indicated hereon in writing.

I further certify that all property so delivered is owned by me and the said delivery to me includes all property stored by the undersigned except as otherwise indicated hereon in writing.

Date _____ Signed _____ Customer or Agent's Signature _____

ACCOUNTS PAYABLE MONTHLY

SALE NOTICE

LOT NO. _____ 19

TO _____

Please take notice that _____ in accordance with the Uniform Warehouse Receipt Act has a lien upon the goods stored with it by you in your name or on your account (or in which you claim an interest).

An itemized statement of the claim showing the amount now due and the date or dates when it became due as follows:

The goods against which the lien of this Company exists consists of all personal and other property as scheduled in the storage warehouse receipt issued to you and numbered _____ and stored by you in your name or on your account in the warehouse of this Company.

We hereby demand that the amount of such claim as above stated and of such further claims as shall accrue shall be paid on or before the _____ day of _____. If such claim is not paid within the time above specified the goods will be duly advertised for sale and sold by public auction at _____ on _____ the _____ day of _____ 19 _____ commencing 10:30 A.M.

The proceeds of such sale will be applied to the payment of said lien, including the reasonable charges for notice, advertisement and sale; and in case any DEFICIENCY shall arise on said sale YOU WILL BE LIABLE THEREFOR and judgment be entered against you.

If for any reason the sale shall not be completed on the said date it will be continued on each succeeding _____ at the same time and place until all the goods are sold or until the lien is satisfied.

In the event the above described property belongs to any person in the United States Services, in any capacity, notify our office immediately by registered mail, advising us the rank, file or division of service, so that adequate protection will be preserved for the interests of the party or parties in the United States Government service.

By _____

FINAL NOTICE

19

Your Storage Account, amounting to \$ _____ is now
seriously overdue, and we herewith request that you make a payment on same
on or before _____

Unless such payment is made we will be obliged to advertise your goods
for sale at public auction.

Thanking you for your immediate attention to this matter, we are
Very truly yours,

(Read other side)

DEFENDANTS' NOTICE OF CROSS MOTION TO DISMISS COMPLAINT,
AND SUPPORTING PAPERS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
SHIRLEY HERRIOTT BROOKS, et al., : CIVIL ACTION
Plaintiffs, : No. 73 Civ. 4050
- against - : HFW
FLAGG BROTHERS, INC., et al., : RULE 9(g) STATEMENT
Defendants. :
-----X

Pursuant to Rule 9(g) of the General Rules of the United States District Court for the Southern and Eastern Districts of New York, defendants, FLAGG BROTHERS, INC. and HENRY FLAGG, the opposing parties to plaintiffs' motion for summary judgment, submit the following statement of the material facts as to which it is contended that there exists a genuine issue to be tried:

A. The Brooks' Complaint

1. Whether plaintiff BROOKS' arrangement with defendant HENRY FLAGG for the removal and storage of her belongings was entered of her own accord or as a result of misleading representations.

2. The moving and storage rates the defendant FLAGG quoted to plaintiff BROOKS. Prior to removing her goods plaintiff BROOKS claims she was given a total charge of \$65.00 for the moving and storage of her goods. Defendant HENRY FLAGG claims his company gave an estimate of \$200.00 for the transportation phase of the job based upon an hourly rate for

DEFENDANTS' NOTICE OF CROSS MOTION TO DISMISS COMPLAINT, AND
SUPPORTING PAPERS

\$28.00 for a van and 3 men and an estimate of the number of barrels and cartons to be used, plus \$75.00 a month for storage.

3. Whether there was agreement between the plaintiff BROOKS and defendants as to the moving and storage rate.

4. Whether the plaintiff BROOKS' belongings were loaded by and transported to warehouse at the specific request of said plaintiff.

5. Whether defendant FLAGG advised plaintiff that storage charges run for a calendar month, i.e., 1st to end of month and not any 30 day cycle, i.e. June 13 to July 13.

6. Whether defendants' charges were reasonable.

B. The Jones' Complaint

7. Whether the removal and storage of plaintiff JONES' belongings by the defendants was authorized by plaintiff.

8. Whether the Department of Social Services of Westchester County authorized defendant to transport plaintiff goods and store for one month at Department's expense.

9. Whether plaintiff JONES was aware that the Department of Social Services authorized payment for transportation and storage of her belongings for one month.

10. Whether plaintiff JONES was advised that after one month's storage she would have to pay storage charges.

11. Whether plaintiff JONES was advised the rate for storage.

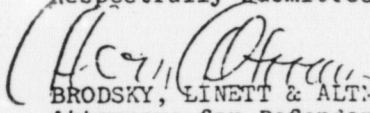
12. Whether defendants misrepresented the amount due and owing them from plaintiff JONES.

DEFENDANTS' NOTICE OF CROSS MOTION TO DISMISS
COMPLAINT, AND SUPPORTING AFFIDAVITS

13. Whether plaintiff JONES agreed to pay all outstanding storage charges.

14. Whether defendants' charge for storage was reasonable.

Respectfully submitted,


BRODSKY, LINETT & ALTMAN
Attorneys for Defendants
Office and P. O. Address
1776 Broadway
New York, New York 10019
212-245-7700

MEMO ENDORSED DENYING PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT

73 CIV. 4050 M.I.G.

Index No.

Year 19

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SHIRLEY HERRIOTT BROOKS, et al.,

Plaintiffs,

- against -

FLAGG BROTHERS, INC., et al.,
Defendants.

NOTICE OF MOTION
FOR CLASS ACTION AND
SUMMARY JUDGMENT

THE LEGAL AID SOCIETY OF WESTCHESTER COUNTY
Attorney for Plaintiffs

Office and Post Office Address, Telephone

56 GRAND STREET

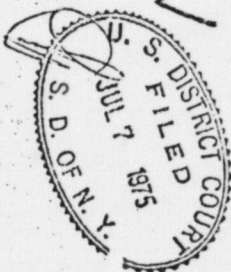
WHITE PLAINS, N. Y. 10601

914-761-9200

Noted for

by the clerk of the court

is hereby admitted.



*Motion denied
Complaint dismissed
for failure to state a claim
No evidence of injury
11/5/81*

MEMO ENDORSED GRANTING DEFENDANT'S CROSS MOTION
TO DISMISS COMPLAINT

77 CIV. 4050

Index No.

Page 19

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW
YORK

SHIRLEY EMMETT BROOKS,
Plaintiff,

vs.

JOHN JONES,
Plaintiff-Intervenor,
-vs-
FLAG BROTHERS, INC. and
HENRY FLAG,
Defendants,

and

THE ATTORNEY GENERAL OF THE
STATE OF NEW YORK, et al.,
Defendants-Intervenor.

NOTICE OF CROSS MOTION TO
DISMISS COMPLAINT, AFFIDAVITS,
AND EXHIBITS

BRODSKY, LINETT AND ALTMAN

Attorneys for Defendants-FLAG
Office and Post Office Address, Telephone

1776 BROADWAY

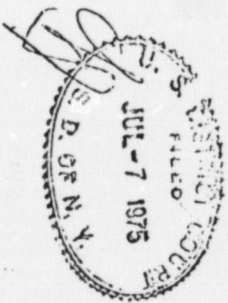
BOROUGH OF MANHATTAN NEW YORK, N. Y. 10019
(212) 245-7700

To

Attorney(s) 1

Service of a copy on the within

is hereby admitted.



*Motion granted
The opinion 7/7/75
is entered Henry A. S. J.*

OPINION OF JUDGE WERKER GRANTING MOTION TO DISMISS
COMPLAINT

Copy # 47712

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
SHIRLEY HERRIOTT BROOKS, GLORIA :
JONES, individually and on behalf :
of all others similarly situated, :

Plaintiffs, :

- against - :

FLAGG BROTHERS, INC., :
individually and as representa- :
tive of a class of all others :
similarly situated, HENRY FLAGG, :
individually and as President of :
Flagg Brothers, Inc., THE :
AMERICAN WAREHOUSEMEN'S ASSOCIA- :
TION OF REFRIGERATED WAREHOUSES, :
INC., WAREHOUSEMEN'S ASSOCIATION :
OF NEW YORK AND NEW JERSEY, :
INC., THE COLD STORAGE WAREHOUSE :
MEN'S ASSOCIATION OF THE PORT OF :
NEW YORK, and LOUIS J. LEFKOWITZ, :
as Attorney General of the State :
of New York, :

Defendants. :

-----x
HENRY F. WERKER, D. J.

OPINION

73 Civ. 4050 (HFW)

Plaintiffs Brooks and Jones are residents of Westchester County whose property was stored by defendant Flagg Brothers, Inc. following their evictions by the Mount Vernon Marshal in 1973. On their own behalf and that of a proposed class of "persons whose property is stored in a warehouse" located in the State of New York and whose property has been encumbered by a lien pursuant to New York Uniform Commercial Code § 209 and subject to sale pursuant to New York Uniform Commercial Code § 210 because of warehouse fees allegedly due,² they challenge the constitutionality of those two statutes pursuant to 42 U.S.C. § 1983.³ They allege

OPINION OF JUDGE WERKER GRANTING MOTION TO DISMISS COMPLAINT

deprivation of due process guaranteed by the Fourteenth Amendment of the United States Constitution, and seek declaratory and injunctive relief as well as money damages. Their proposed class of defendants includes "all . . . warehousemen doing business in the State of New York and who impose liens and subject goods to sale pursuant to New York Uniform Commercial Code §§ 209-210 without affording the owner of the goods a prior opportunity to be heard."⁴

Section 7-209 grants a warehouseman a lien on goods stored, and/or transported, for fees allegedly owed by the customer.⁵ Section 7-210 gives a warehouseman the authority to enforce such a lien by public or private sale upon proper notification to the customer and adherence to commercially reasonable sale procedures.⁶

Plaintiffs have moved for class action certification of both a plaintiff and a defendant class, and for summary judgment on the question of the statutes' constitutionality. Defendants have cross-moved to dismiss for failure to state a cause of action and for lack of subject matter jurisdiction on the ground that the challenged conduct does not constitute state action within the meaning of the Fourteenth Amendment, and was not performed "under color of" state law within the meaning of § 1983.⁷ Upon careful consideration of the facts in this case and the following analysis of relevant Second Circuit and Supreme Court decisions, the court finds that defendants are indeed correct. Plaintiffs' action is consequently dismissed for lack of jurisdiction.

OPINION OF JUDGE WERKEN GRANTING MOTION TO DISMISS COMPLAINT

Plaintiffs have advanced four arguments in support of their assertion that state action is present in the challenged activity. Their first argument is that the Second Circuit's decision in Hernandez v. European Auto Collison, Inc., 487 F.2d 378 (2d Cir. 1973) compels a finding of state action in this case. State action, however, was never discussed in that opinion. In Hernandez plaintiff challenged the garageman's lien provisions of the New York Lien Law which allow a garageman to detain an automobile until alleged storage and repair charges are paid, and to foreclose his lien by selling the auto upon proper notification to the bailor. The district court judge dismissed the complaint, noting:

"[E]ven assuming that the defendants are acting under color of state law, the court cannot find that the plaintiffs' constitutional right to due process of law has been deprived by the operation of the challenged provisions of the lien law. Consequently, . . . , the court need not go further and formally pass upon the second requirement - the presence of state action."

346 F.Supp. 313, 317 (E.D.N.Y. 1972). On appeal the Second Circuit upheld the dismissal as to the detention provisions of the New York Lien Law because it found that having voluntarily delivered his car to the defendant garageman, and having never requested its return or tendered reasonable storage charges, the plaintiff had no standing to challenge the lien. 487 F.2d at 380. As to the sale provisions of the statute, however, the court noted that if, upon remand, the district judge were

OPINION OF JUDGE WERKER GRANTING MOTION TO DISMISS COMPLAINT

to find plaintiff's version of the facts as alleged,

"then we would conclude that plaintiff has, under the doctrines enunciated in Fuentes v. Shevin, 407 U.S. 67 (1972), Bell v. Burson, 402 U.S. 535 (1971), and Sniadach v. Family Finance Corp., 395 U.S. 337, a tenable contention that Section 204 of the New York Lien Law as applied here was repugnant to the due process clause of the Fourteenth Amendment. . . ."

Id. at 380-81. Neither the court's opinion nor the concurring opinion¹⁰ in Hernandez mentioned or discussed the issue of state action.

Plaintiffs argue that a "finding" of state action is implicit in both Hernandez opinions. However, because District Judge Costantino had merely assumed the presence of state action in order to consider and dismiss the Hernandez constitutional claim on its merits, the state action issue was not properly before the Court of Appeals; the sole issue on appeal was whether, assuming state action, plaintiff had stated a claim. Furthermore, even if a finding of state action were implicit in the Second Circuit's decision, this court would not be bound by such a sub silentio ruling. United States v. L.A. Tucker Truck Lines, 344 U.S. 33, 38 (1952). This court therefore concludes that the Second Circuit's decision in Hernandez is not dispositive of the state action issue in this case.

Plaintiffs, in their remaining argument, would have the court find state action because:

- the warehouseman who enforces his own lien pursuant to § 7-210 is performing what has

OPINION OF JUDGE WERKER GRANTING MOTION TO DISMISS COMPLAINT

traditionally been a public function;

- the state imposes extensive regulation on the warehousing industry, including regulation of the challenged activity; and
- section 7-210 confers on warehousemen rights in excess of those at common law.

The question of whether state action exists usually arises with respect to private conduct upon an allegation that the conduct is "so entwined with governmental policies or so impregnated with a governmental character as to become subject to the . . . limitations placed upon state action." Evans v. Newton, 382 U.S. 296, 299 (1966). However, as the Supreme Court noted in Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 172 (1972), "while the principle is easily stated, the question of whether particular discriminatory conduct is private, on the one hand, or amounts to 'state action,' on the other hand, frequently admits of no easy answer." The answers, particularly in recent months, have varied from circuit to circuit, and even within the Second Circuit have produced division and disagreement among panels.¹¹

In Jackson v. Statler Foundation, 496 F.2d 623 (2d Cir. 1974), cert. denied, 420 U.S. 927 (1975), Judge Smith enumerated five factors culled from a review of state action case law which the court found to be "particularly important to a determination of state action":¹²

- (1) the degree to which the 'private' organization is dependent on governmental aid;
- (2) the extent and intrusiveness of the governmental regulatory scheme;

OPINION OF JUDGE WERKER GRANTING MOTION TO DISMISS COMPLAINT

(3) whether that scheme connotes government approval of the activity or whether the assistance is merely provided to all without such connotation; (4) the extent to which the organization serves a public function or acts as a surrogate for the state; (5) whether the organization has legitimate claims to recognition as a 'private' organization in associational or other constitutional terms.

Each of these factors is material; no one factor is conclusive.

* * *

Moreover, even if one of these factors is absent, a finding of state action may still be appropriate.

Id. at 629-34 (emphasis added). Plaintiffs' second argument for state action, that in enforcing his own lien a warehouseman is performing a public function, finds support in Judge Smith's list above. Their rationale is that at common law a warehouseman could enforce his lien only by obtaining a court judgment and having the sheriff execute on it; thus, by allowing a warehouseman to enforce his lien without resort to the courts and the sheriff, § 7-210 enables him to perform an "inherently" public function. Plaintiffs rely for this theory upon Blye v. Globe-Wernicke Realty Co., 33 N.Y.2d 15, 20 (1973) in which the New York Court of Appeals found that an innkeeper's execution of his own lien amounts to the exercise of a public function: "[T]he execution of a lien, be it a conventional security interest, (cite), a writ of attachment (cite), or a judgment lien (cite), traditionally has been the function of the Sheriff."

The liens referred to by the Blye court, however, all involve satisfaction of a debt having no particular relation

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to the goods executed upon. While such liens historically belong to the sheriff for execution, execution on goods lawfully in a warehouseman's possession, to satisfy charges arising out of such possession, is not traditionally a function of the sheriff; traditionally the sheriff was called upon for execution on goods only after the warehouseman had obtained a judgment lien.¹³ Melara v. Kennedy, 74 Civ. 1535, N.D.Cal., August 21, 1974. Accord, Collier, Procedural Due Process - Post Fuentes Constitutionality of Garageman's Liens, 54 B.U.L.Rev. 542, 554 (1974). This distinction mandates rejection of the public function theory.¹⁴ Cf. James v. Pinnex, 495 F.2d 206, 208 (5th Cir. 1974); Melara v. Kennedy, supra. In Melara, a case substantially identical to the one at hand, the court held that enforcement of a lien pursuant to § 7210 of the California Uniform Commercial Code was not performance of a state or public function, and did not constitute state action. See also Parks v. Ford, 72 Civ. 639, 73 Civ. 1699, E.D.Pa., December 11, 1974. (Pennsylvania's repairman's lien statutes do not so infuse private acts of detention and sale with state involvement as to render them state action).

Plaintiffs' third argument in support of state action relies upon the public function theory and must be rejected with it. They suggest that because "warehouses and warehousemen are affected with a public interest," state regulation of the industry permeates its nominally private acts with state action. This line of reasoning was effectively foreclosed by

OPINION OF JUDGE WERKER GRANTING MOTION TO DISMISS COMPLAINT

the Supreme Court in Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974). In that case petitioner challenged the constitutionality of the defendant's authority, under a tariff filed with the State Public Utilities Commission, to cut off her electric power without meeting the due process standards enumerated in Fuentes v. Shevin, 407 U.S. 67 (1972). Justice Rehnquist, writing for the Court, stated:

Perhaps in recognition of the fact that the supplying of utility service is not traditionally the exclusive prerogative of the State, petitioner invites the expansion of the doctrine of this limited line of cases into a broad principle that all businesses 'affected with the public interest' are state actions in all their actions.

We decline the invitation for reasons stated long ago in Nebbia v. New York, 291 U.S. 502 (1934), . . . :

It is clear that there is no closed case or category of businesses affected with a public interest The phrase 'affected with a public interest' can, in the nature of things, mean no more than that an industry, for adequate reason, is subject to control for the public good In several of the decisions of this Court wherein the expressions 'affected with a public interest' and 'clothed with a public use' have been put forward as the criteria . . . it has been admitted that they are not susceptible of definition and form an unsatisfactory test.' Id., at 536.

Id., at 353.

Plaintiffs seem to have anticipated such foreclosure, for they suggest in the alternative that even if the challenged activity is essentially private, state regulation of the

OPINION OF JUDGE WERKER GRANTING MOTION TO DISMISS COMPLAINT

industry is so directly and significantly involved therein that the state must be viewed as a joint participant. Under this rubric which tracks factor (2) in Judge Smith's list above, the state's "involvement" is its regulation of the warehouseman's lien sale and its failure to include in that pervasive regulation a requirement of Fuentes due process standards. This in essence is the theory first used by the Supreme Court in Burton v. Wilmington Parking Authority¹⁵ 365 U.S. 715 (1961). Burton, however, is distinguishable in two important ways. First, in the instant case the symbiotic relationship between the state and the private defendant present in Burton is missing. Secondly, Burton was a case involving racial discrimination, and "racial discrimination is so peculiarly offensive and . . . so much the prime target of the Fourteenth Amendment that a lesser degree of involvement may constitute 'state action' with respect to it than would be required in other contexts." ¹⁶ Coleman v. Wagner College, 429 F.2d 1120, 1127 (2d Cir. 1970). See also Greco v. Orange Memorial Hospital Corp., 43 U.S.L.W. 2522-23 (5th Cir. 1975); Adams v. So. Cal. First National Bank, 492 F.2d 324, 333 (9th Cir. 1973), cert. denied, 43 U.S.L.W. 3277 (1974). Thus resolution of the state action issue in this, a non-racial case, is not controlled by the standards evolved in cases of racial discrimination.

Plaintiff's last argument, and by all appearances the sturdiest, is that by statutorily conferring on

OPINION OF JUDGE WERKREGRANTING MOTION TO DISMISS COMPLAINT

warehousemen a power not possessed at common law, the state has created an impetus for warehouseman lien sales, has encouraged such sales, and has thereby so involved itself in the challenged conduct as to transform it into state action.¹⁷ (See factor (3) of Judge Smith's Jackson v. Statler Foundation list, supra.) The key to this argument is the alteration of common law, for the Second Circuit in recent decisions has held mere statutory codification of common law rights insufficient state involvement to constitute state action. Bond v. Dentzer, 494 F.2d 302 (2d Cir. 1974); Shirley v. State National Bank, 493 F.2d 739 (2d Cir. 1974). In Shirley, where plaintiff challenged repossession of goods purchased under an installment sales contract, the court stated:

... since peaceful repossession existed at common law in Connecticut, the mere codification of that right does not, in our view, constitute state action.

Id. at 743. Likewise, in Bond, the court found that state action was not present in an assignment of wages made pursuant to New York's wage assignment statute because "the statute has not given the assignee anything new." Id. at 311. See also Phillips v. Money, 503 F.2d 990 (7th Cir, 1974); Fletcher v. Rhode Island Hospital Trust National Bank, 496 F.2d 927 (1st Cir. 1974); Parks v. Ford, supra at 30-31; Boland v. Essex County Bank and Trust Co., 361 F. Supp. 917 (D. Mass. 1973).¹⁸

The question remains whether satisfaction of this

OPINION OF JUDGE WERKER GRANTING MOTION TO DISMISS COMPLAINT

"common law codification or alteration" test alone constitutes state involvement significant enough to be called state action. Judge Smith in Jackson v. Statler Foundation, supra, warned that "no one factor is conclusive." By definition, if the facts here do not meet the state action standards for cases of racial discrimination such as Statler Foundation, they do not meet the more exigent prerequisites to state action in non-racial cases. The Fifth and Ninth circuits, in the context of challenges to self-help repossession statutes, have both found the common law test, alone, to be insufficient. In Adams v. So. Cal. First National Bank, supra, the Ninth Circuit stated:

[W]e do not consider it conclusive that section 9503 of the California Commercial Code confirmed what the law of California had theretofore been, i.e., that a secured party upon default had a right to take possession of the collateral. This is not the final answer to the touchstone of state action. Were such a test the only one, the California statutes adopting the common law of England would cast the shadow of state action over all activity and pose an argument that could blanket all individual wrongs under section 1983.

492 F.2d at 330. The Fifth Circuit in James Pinnex, supra, noted:

. . . the fact is that Mississippi cases did not sanction self-help repossession except when provided for in the parties' contract, whereas § 9-503 allows it except when the contract is silent on the point. Thus the creditor's arguments that § 9-503 merely carried forward the former Mississippi practice and that the contract is the sole source of summary repossession power, lose some force.

OPINION OF JUDGE WERKER GRANTING MOTION TO DISMISS COMPLAINT

495 F.2d at 498. The court then went on to conclude, however, "No bright lines can be drawn in this area, and we draw none. Some state involvement . . . may be present here, but it is simply not enough, given the nonracial nature of the case, to constitute state action."

Given the Second Circuit's discussions in Shirley and Bond, as well as relevant decisions from other courts, it seems clear to this court that with respect to those members of plaintiffs' "class" whose contracts contained a sale-in-case-of-default provision, there is no state action. See note 17 supra. As the Ninth Circuit noted in Adams, "the State cannot be held responsible for creating conditions that result in standardized contracts in the credit industry which typically provide for self-help repossession without notice or an opportunity for a hearing prior to the seizure of property." 492 F.2d at 333. See Note - State Action: Theories for Applying Constitutional Restrictions to Private Activity, 74 Col. L. Rev. 656 at 665 (1974). Indeed, one case which has dealt specifically with § 7-210 and a contractual provision for sale has so ruled. Smith v. Bekins Moving and Storage Co., 384 F. Supp. 1261 (E.D.Pa. 1974). Furthermore, here as in Shirley and Bond, the codification and alteration of common law also impose certain procedural restraints on it, to the benefit of warehouse customers, i.e., requirements as to fair notice, reasonable sale, etc., and thus, as in those cases, represent amelioratory rather than regressive

OPINION OF JUDGE WERKER GRANTING MOTION TO DISMISS COMPLAINT

action. "Private action does not become state action simply because government regulation has not gone so far as a plaintiff would like." Jackson v. Statler Foundation, supra at 639.

Likewise, with respect to those in plaintiffs' "class" who are subject to no contractual provision of sale, the court also fails to find sufficient state involvement to constitute state action. It is true that for this group of warehouse customers the defendants' power of sale comes only from § 7-210. However, in its decision in Jackson v. Metropolitan Edison Co., supra, the Supreme Court stated: "Approval by a state utility commission . . . , where the Commission has not put its own weight on the side of the proposed practice by ordering it, does not transmute a practice initiated by the utility and approved by the Commission into 'state action.'" Id. at 357 (emphasis added). In this case no less than in Jackson, the state's involvement in the challenged activity is merely permissive. For this reason, and for the reasons detailed above, the court must conclude that plaintiffs have failed to show sufficient state involvement in the enforcement of warehousemen's liens to confer jurisdiction upon a federal district court under 28 U.S.C. § 1343(3), or to state a claim under 42 U.S.C. § 1983. The action is therefore dismissed.

SO ORDERED.

Dated: New York, New York

July 7, 1975

U. S. D. J.

OPINION OF JUDGE WERKER GRANTING MOTION TO DISMISS COMPLAINT

SHIRLEY HERRIOTT BROOKS, et al. v. FLAGG BROTHERS, INC.,
et al., 73 Civ. 4050 (HFW)

NOTES

1. For the allegations of these named plaintiffs see the decision on Jones' motion to intervene by the Honorable Murray Gurfein, then U.S.D.J., at 63 F.R.D. 409, 411-12 (S.D.N.Y. 1974).
2. Verified Complaint at 2.
3. Section 1983 reads:
Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.
Federal district courts have jurisdiction to hear actions under § 1983 by virtue of 28 U.S.C. § 1343(3).
4. Verified Complaint at 3.
5. Prior to codification by the U.C.C. and its predecessors, such a lien existed at common law. R. Brown, *The Law of Personal Property* § 119 (2d ed. 1955).
6. Such a right of enforcement did not exist in New York at common law, although it has existed in statutory form since 1879. See note 17, *infra*.
7. The "state action" and "action under color of state law" concepts have been found to be functionally equivalent. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970). Hereinafter they shall be jointly referred to as "state action."
8. The statutes challenged in *Hernandez* are substantially similar to those in question here. Compare, New York Lien Law §§ 184, 201, 202 and 204 with New York U.C.C. §§ 7-209, and 210.
9. In a footnote, however, Judge Costantino noted that the presence of state action "would seem to be quite manifest."

OPINION OF JUDGE WERKER GRANTING MOTION TO DISMISS COMPLAINT

"Though he is a private individual, the licnor through the public auctioneer it has retained, is performing a traditionally public function pursuant to a right accorded it by a state statute." 346 F. Supp. 313 at 317.

10. Judges Timbers and Lumbard, in a concurring opinion, went further than Judge Wyzanski in the court's opinion, stating that they would direct the district court to declare the sale provisions unconstitutional as applied if plaintiff were to prove his allegations.

11. In Tucker v. Maher, 497 F.2d 1309 (2d Cir. 1974) Judge Mulligan noted:

Constitutional law, particularly in this difficult and confusing area of state action and due process, is hardly predictable with any degree of certainty. The very recent history of such constitutional litigation in this circuit should convincingly indicate that the role of the prophet is precarious at best.

In a footnote he then added:

In Shirley v. State Nat'l Bank, 493 F.2d 739 (2d Cir. 1974), and Bond v. Dentzer, 494 F.2d 302 (2d Cir. 1974), after both panels had split 2-1 over state action issues, rehearings en banc were denied . . . by votes of 5-3. In Jackson v. Statler Foundation, 496 F.2d 623 (2d Cir. 1974), again a state action case, a rehearing en banc was also denied by a failure of a majority of the active judges to vote in-favor of such reconsideration; the vote was 4-4, 496 F.2d at 636.

Id. at 1315.

12. Although the Jackson v. Statler Foundation factors were enumerated in the context of an action against charitable foundations for alleged racial discrimination, and the courts have traditionally used a lesser state action standard where race is concerned (see page 9, infra), they are helpful in delimiting the outer boundaries of state action prerequisites. The court in Statler Foundation found that if the defendant institutions were substantially dependent upon their tax-exempt status, if the government's regulatory scheme was both detailed and intrusive, if the scheme carried connotations of government approval, if the institutions did not have a substantial constitutional claim to be left alone, and if they served some public function, then the district court on remand could find state action.

OPINION OF JUDGE WERKER GRANTING MOTION TO DISMISS COMPLAINT

13. Ever since its statutory creation in 1879 (L. 1879 c. 336), the warehouseman's lien has traditionally been enforced by warehousemen themselves.
14. Even if this court were to conclude, however, that enforcement of a lien pursuant to § 7-210 constitutes execution of a public function, this conclusion would not lead inexorably to a finding of state action. See Jackson v. Metropolitan Edison Co., 419 U.S. 345, 353 (1974); Powe v. Miles, 407 F.2d 73, 30 (2d Cir. 1968).
15. In Jackson v. Metropolitan Edison Co., *supra*, the Supreme Court described the Burton case as follows:

. . . where a private lessee who practiced racial discrimination leased space for a restaurant from a state parking authority in a publicly owned building the Court held that the State had so far insinuated itself into a position of interdependence with the restaurant that it was a joint participant in the enterprise. *Id.* at 725. We cautioned, however, that 'while a multitude of relationships might appear to some to fall within the Amendment's embrace,' differences in circumstances beget differences in law, limiting the actual holding to lessees of public property.

419 U.S. at 357-58.
16. Our circuit has long recognized a double 'state action' standard, a less onerous test for cases involving racial discrimination, and a more rigorous standard for other claims. See United States v. Wiseman, 445 F.2d 792, 795 at n.3 (2d Cir. 1971).
17. The statutory right to enforce the warehouseman's lien, first enacted in 1879, was reenacted as § 118 of the New York General Business Law in 1907. L. 1907, c. 732 § 33, as amended L. 1949, c. 588. In 1962 the state legislature again reenacted it, this time as part of the U C C , effective since 1964. The state courts have traditionally considered these statutory provisions to be in derogation of common law. See, e.g.: Maritime World Corp. v. Greffe Steel Warehouse Corp., 154 N.Y.S. 2d 684 (S. Ct. N.Y. Cnty 1956); Hackett v. Nelson Express & Storage Co., 294 N.Y.S. 905 (S. Ct. N.Y. Cnty 1937). To the extent, however, that contractual provisions between warehousemen and customers allowing for sale in case of default have been enforced by the courts,

OPINION OF JUDGE WERKER GRANTING MOTION TO DISMISS COMPLAINT

sale provisions of contractual origin can be said to be part of the state's common law. Cf. note 18, infra. A majority of warehouseman contracts in New York apparently contain such provisions.

18. In Boland, the court examined the constitutional validity of the Massachusetts self-help repossession statute. It found that at common law repossession was allowed only if provided for by contract, whereas the statute in question allowed repossession unless it was prohibited by contract. In dicta the court asserted that the same differences had existed in Shirley v. State National Bank, supra, between the common and statutory law of Connecticut, adding: "... there is no indication in the [Second Circuit] court's ruling in Shirley v. State National Bank that the parties undertook to demonstrate to the court the changes in the law of Connecticut brought about by its enactment of the U C C " Id at 921. The Boland court found that state action existed.
19. The court notes that a challenge to §§ 7-209 and 7-210 has already been mounted in the state courts. In Jones v. Banner Moving and Storage Inc., 358 N.Y.S.2d 885 (Kings Cnty 1974), the New York Supreme Court found those statutes to be unconstitutional for essentially the same reasons plaintiffs would present here. That decision has been argued on appeal to the Appellate Division, 2d Dept., and is now sub judice.

NOTICE OF APPEAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----- X

SHIRLEY HERRIOT BROOKS, GLORIA JONES,
individually and on behalf of all others
similarly situated,

Plaintiffs,

NOTICE OF APPEAL
73 Civ. 4050 HFW

- - - - -st-

FLAGG BROTHERS, INC., individually and as
representatives of a class of all others
similarly situated, HENRY FLAGG, individually
and as President of Flagg Brothers, Inc., THE
AMERICAN WAREHOUSEMEN'S ASSOCIATION OF
REFRIGERATED WAREHOUSES, INC., WAREHOUSEMEN'S
ASSOCIATION OF NEW YORK AND NEW JERSEY, INC.,
THE COLD STORAGE WAREHOUSEMEN'S ASSOCIATION OF
THE PORT OF NEW YORK, and LOUIS J. LEFKOWITZ,
as Attorney General of the State of New York,

Defendants.
----- X

NOTICE is hereby given that SHIRLEY HERRIOT BROOKS,
GLORIA JONES, individually and on behalf of all others similarly
situated, plaintiffs above named, hereby appeal to the United
States Court of Appeals for the Second Circuit from the judg-
ment and order of the United States District Court denying
plaintiffs' motions for a class action determination and summary
judgment, and granting defendants' motion to dismiss, and from
the judgment and order dismissing the above entitled action,
and from each and every part of said judgment and orders, entered
in this action on the 7th day of July, 1975.

NOTICE OF APPEAL

Dated: July 24, 1975
White Plains, New York

Martin A. Schwartz

THE LEGAL AID SOCIETY OF
WESTCHESTER COUNTY
By: Martin A. Schwartz,
of Counsel
Laurence Kahn,
of Counsel

56 Grand Street
White Plains, New York 10601
Tel: (914) 761-9200
Attorneys for Plaintiffs

Attorneys for Defendants

A. Seth Greenwald, Esq.
Assistant Attorney General
State of New York Dept. of Law
Two World Trade Center
New York, New York 10047

Alvin Altman, Esq.
Brotsky, Linett, & Altman
1776 Broadway
New York, New York 10019

Norman Weiss, Esq.
Weirer & Weiss
2 West 45th Street
New York, New York 10036

Arnold Shaw, Esq.
Jaffe, Shaw & Rosenberg
51 Madison Avenue
New York, New York 10010

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT No. 75-7437

Index No.

SHIRLEY HERRIOT BROOKS, et al.,

Plaintiffs-Appellants

~~Plaintiffs~~

against

FLAGG BROTHERS, INC., et al.,

Defendants-Appellees.

~~Defendants~~

AFFIDAVIT OF SERVICE
BY MAIL

STATE OF NEW YORK, COUNTY OF WESTCHESTER

SS.:

The undersigned being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age and resides at Highview Terrace,
Pleasantville, New York.

That on October
Appendix

1975, deponent served the annexed

on Jaffe, Shaw & Rosenberg, Esqs.,
attorney(s) for Defendants

in this action at 51 Madison Ave., New York, New York 10010

the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed
in a postpaid properly addressed wrapper, in ~~a post office~~ ^{an} official depository under the exclusive care
and custody of the United States Postal Service within the State of New York.

Sworn to before me

this 31 day of October, 1975

Martin A. Schwartz

MARTIN A. SCHWARTZ
Notary Public, State of New York
No. 03-355455

Qualified in Bronx County
Certified filed in New York County
Commission Expires March 30, 1979

Kitty L. Huebbe
The name signed must be printed beneath

Kitty L. Huebbe

Index No.

against

Plaintiff

Defendant

ATTORNEY'S
AFFIRMATION OF SERVICE
BY MAIL

STATE OF NEW YORK, COUNTY OF

ss.:

The undersigned, attorney at law of the State of New York affirms: that deponent is
attorney(s) of record for

That on

19

deponent served the annexed

on

attorney(s) for
in this action at

the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed
in a postpaid properly addressed wrapper, in—a post office—official depository under the exclusive care
and custody of the United States Postal Service within the State of New York.

The undersigned affirms the foregoing statement to be true under the penalties of perjury.

Dated

The name signed must be printed beneath

Attorney at Law

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT No. 75-7437

Index No.

SHIRLEY HERRIOT BROOKS, et al.,
Plaintiffs-Appellants,
against
FLAGG BROTHERS, INC., et al.,
Defendants-Appellees.

AFFIDAVIT OF SERVICE
BY MAIL

STATE OF NEW YORK, COUNTY OF WESTCHESTER

SS.:

The undersigned being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age and resides at Highview Terrace,
Pleasantville, New York.

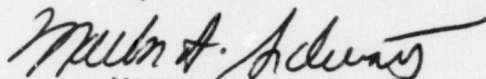
That on October
Appendix

19 75 deponent served the annexed

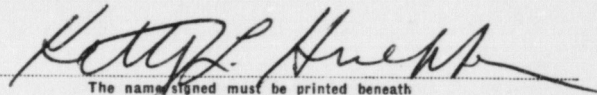
on Werner & Weiss, Esqs.,
attorney(s) for Defendants
in this action at 2 West 45th Street, New York, New York 10036
the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed
in a postpaid properly addressed wrapper, in ~~a post office~~ official depository under the exclusive care
and custody of the United States Postal Service within the State of New York.

Sworn to before me

this 31 day of October, 1975



MARTIN A. SCHWARTZ
Notary Public, State of New York
No. 03-3555455
Qualified in Bronx County
Certif. filed in New York County
Commission Expires March 30, 1977



The name signed must be printed beneath

Kitty L. Huebbe

Index No.

against

Plaintiff

Defendant

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Dated

The name signed must be printed beneath

Attorney at Law

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT No. 75-7437

Index No.

SHIRLEY HERRIOT BROOKS, et al.,
Plaintiffs-Appellants,
~~Plaintiffs~~
against
FLAGG BROTHERS, INC., et al.,
Defendants-Appellees.
~~Defendants~~

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BY MAIL

STATE OF NEW YORK, COUNTY OF WESTCHESTER

SS.:

The undersigned being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age and resides at Highview Terrace,
Pleasantville, New York.

That on October 1975 deponent served the annexed
Appendix

on Hon. Louis J. Lefkowitz, Attorney General, Att.: A. Seth Grenawald, Esq.,
attorney(s) for Defendants
in this action at Two World Trade Center, New York, New York 10007
the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed
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and custody of the United States Postal Service within the State of New York.

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Martin A. Schwartz

Kitty L. Huebbe
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Certif filed in New York County
Commission Expires March 30, 1977

Index No.

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Plaintiff

Defendant

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AFFIRMATION OF SERVICE
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STATE OF NEW YORK, COUNTY OF

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Dated

The name signed must be printed beneath

Attorney at Law

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT No. 75-7437

Index No.

SHIRLEY HERRIOT BROOKS, et al.,
Plaintiffs-Appellants,
~~Plaintiffs~~
against
FLAGG BROTHERS, INC., et al.,
Defendants-Appellees.
~~Defendants~~

AFFIDAVIT OF SERVICE
BY MAIL

STATE OF NEW YORK, COUNTY OF WESTCHESTER

SS.:

The undersigned being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age and resides at Highview Terrace,
Pleasantville, New York.

That on October
Appendix

19 75, deponent served the annexed

on Brodsky, Linett & Altman, Esqs., Att.: Irving Altman, Esq.,
attorney(s) for Defendants
in this action at 1776 Broadway, New York, New York 10019
the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed
in a postpaid properly addressed wrapper, in ~~a post office~~ ^{can} official depository under the exclusive care
and custody of the United States Postal Service within the State of New York.

Sworn to before me

this 31 day of October, 1975.

Martin A. Schwartz

MARTIN A. SCHWARTZ
Notary Public, State of New York
No. 03-3555455

Qualified in Bronx County
Certif filed in New York County
Commission Expires March 30, 1977

Kitty L. Huebbe
The name signed must be printed beneath
Kitty L. Huebbe



Index No.

against

Plaintiff

Defendant

ATTORNEY'S
AFFIRMATION OF SERVICE
BY MAIL

STATE OF NEW YORK, COUNTY OF

ss.:

The undersigned, attorney at law of the State of New York affirms: that deponent is
attorney(s) of record for

That on

19 deponent served the annexed

on

attorney(s) for
in this action at

the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed
in a postpaid properly addressed wrapper, in—a post office—official depository under the exclusive care
and custody of the United States Postal Service within the State of New York.

The undersigned affirms the foregoing statement to be true under the penalties of perjury.

Dated

The name signed must be printed beneath

Attorney at Law